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THE LAW

OF

RAILROAD RATE REGULATION

WITH SPECIAL REFERENCE TO

AMERICAN LEGISLATION.

BY

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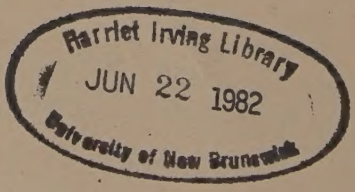

PREFACE.

The passage of the Federal Railroad Rate Act of 1906 has both emphasized the present importance and added to the future importance of the law governing the regulation of railroad rates. In all interstate shipments, which comprise so large a proportion of our railroad traffic, and in the local shipments of a very large number of our States, the maximum rates are now regulated by law; either directly by legislature, or (as is usually the case) by the action of a commission under authority conferred by the legislature.

It is hardly necessary at this time to call special attention to the practical importance to every member of the community of the charges made by the railroads. To the vast majority these charges are an important part of the cost of their food; it is in the power of the great trunk lines, except where the law can restrain them, by an increase of rates to cause a famine as serious as would be caused by a complete failure of the crops. To a great number of our people, on the other hand,—to the great farmers of the interior, to the ranch men of the plains, to the planters of the South, to the manufacturers of the seaboard, and to the millions of their employes who are dependent upon their prosperity,—railroad charges are of greater immediate importance. The railroads, if unrestrained by law, can prosper or can ruin them; they can build up a great and flourishing business, or they can turn an industrious city into a wilderness again. That power such as this should be the subject of legal restraint is inevitable; that the legal qualities and limitations of such restraint should be of the greatest interest to the profession and to the people at large is clear.

From the earliest times some restraint has been exercised over such lines of industry as are of vital interest to the public. The establishment of the King's peace, the protection of the weak against the actual physical violence of the strong, is the fundamental function of government in the modern sense; but of equal importance and of almost equal antiquity is the protection of the common people against the greed and oppression of the powerful. In matters not vital to the life and well-being of mankind the laws of society may be left free to operate, without limitation by the sovereign power; but in all that has to do with the necessaries of life the protection of the sovereign is extended. He protects equally against physical violence and against oppression that affects the means of living.

In modern times the prevalence in commercial life of the principle of *laissez faire* has led to the formation of great industrial combinations. Great enterprises have taken the place of small ones, and great industries have been localized at the most convenient parts of the country. All this commercial organization has been based upon the development of railroads; which are necessary not only to bring the raw material to the factory and to distribute the finished product, but also to supply with the necessaries of life every inhabitant of the country. The result has been the establishment of great and powerful corporations in whose hands is the railroad carriage of the country. But as these great combinations of capital have grown up under the law, so their legal rights must be subject to the rights of the whole people; great power brings as its consequence the need of control of that power for the good of the whole people.

Two ways only can be found to exercise such control. One way, that advocated by the most radical statesmen, is the government ownership and operation of the railroads. The other way, which is in fact the conservative method of dealing with the problem, is the control of the rates and practices of the railroads for the public good. One or the other of these methods must be finally adopted. The conservative method is now on

trial. It behooves the lawyers to see to it that it be so intelligently tried, and that the law applicable to the case be so accurately enforced, that we may not be driven perforce to the radical alternative of public ownership.

The belief that this duty has, almost without warning, been thrust upon the profession, and that the average lawyer has not been prepared either by study or by experience to solve the difficult questions that may arise, has led the authors to prepare and publish this treatise, with the hope that it may help the profession to meet its new and perplexing problems. But in order to render such assistance, it seemed to the authors that a treatise which merely collected and discussed judicial decisions upon railroad rates would be a very imperfect work. The law of railroad rates is based upon the general principles of public-service law and cannot be mastered without an adequate knowledge of that law. The first task of the authors has therefore been to give a sufficient though concise view of such portions of the primary obligations of those in public employments, and particularly of carriers, as bears essentially on the problem of rates. For this portion of their subject the authors have been prepared by special studies during the last ten or twelve years; and though the subject has not been greatly elaborated, it is their hope that this first part of the treatise will be found generally useful.

That portion of the subject which deals more particularly with the fixing of rates has been studied with patient care, and authorities have been sought wherever it was thought they could be found. As this is a topic in the law of public employments, the doctrines involved are the same whether the rates in question are those of railroads, or of gas or water companies, or of other companies engaged in a public employment. Cases therefore involving the rates of these companies have been sought and cited. Even including these cases, the judicial decisions in which the law governing rates has been involved have been few and almost invariably recent; for the importance of the law is new.

It has, therefore, seemed best to examine the most important decisions in detail and to give in many cases the very language of the courts; since thus only may the reader have an accurate knowledge of the current doctrine and its probable development. Not that the authors have hesitated to express their own opinions upon novel or difficult points; indeed, they fear that the bar may feel that they have been too free in giving their own views of the law.

In dealing with rate problems, the authors have cited and examined the decisions of the Interstate Commerce Commission in the same way that they have cited and examined those of the courts. They regard this course of action as most important. Not only in proceedings before the Commission itself, but even in the Supreme Court of the United States, these decisions have been cited as authoritative; and with the increased power given to the Commission by the late Act its opinions will have an increased importance and will contribute most materially to the development of the law.

Our purpose has involved not merely a study of the common law as it bears upon railroad rates, but an examination as well of the statutory provisions. We have given the full text of the Interstate Commerce Act as it now stands, with full annotations including the decisions of the Commission and of the Courts. We have also given such parts of the State acts as were thought to be of use in such a book, our idea being to let a lawyer in any State know what sort of statutes there are in other States.

This treatise aims to give not merely the law of railroad rates, but also the practice before the Interstate Commerce Commission. For this purpose those sections of the Act which touch on practice have been annotated with especial fulness, and in the Appendix have been included the Rules of Practice of the Commission and a set of approved Forms. This, it is hoped, will assist lawyers who will be engaged for the first time in prac-

tice before the Commission by reason of its enlarged powers and increased functions.

A few words of apology must be added. While the authors have been studying this subject for many years, and have had the great advantage of discussing it with successive classes of students during that period, they undertook to write this treatise in a very few months, their idea being that to be of real use to the profession the book should be published as soon as the new federal legislation went into effect. For those who can realize by experience the labor of writing and putting through the press a work of this size and scope in so short a time the errors, typographical and otherwise, will appear not unnatural or altogether inexcusable. Many such errors will be found; we hope however, that nothing of the sort will be so serious as to obscure the meaning of the text, and that the practical usefulness of the book will not be affected.

J. H. B., Jr.
B. W.

Cambridge, July 1, 1906.

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§ 1. Public callings and private callings.

The distinction between the private callings—the rule—and the public callings—the exception—is a division in the law governing our business relations which has and will have most important consequences. The causes of the division are economic rather than strictly legal. Free competition, the very basis of the modern social organization, superseded almost completely mediæval restrictions, but it has just come to be recognized that the process of free competition fails in some cases to secure the public good, and it has been reluctantly admitted that some control is necessary over such lines of industry as are affected with a public interest. At this point the problem of public callings becomes a legal one.

In private businesses, one may sell or not, as one pleases, manufacture what qualities one chooses, demand any price that can be got, and give any rebates that are advantageous. But in public businesses one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discriminations.

The significance of this distinction between the public calling and the private calling may be appreciated from an examination of the general course of events leading up to the present industrial situation. For this distinction between the public

callings and the private callings has been taken in our law from the earliest times to the present day.

TOPIC A.—MEDIAEVAL CONDITIONS.

§ 2. The distinction between public employment and private business an old one.

From early times there has been a peculiar law governing certain callings which were regarded as public in character. These callings have always been regulated by the State to a greater extent than ordinary employments; indeed the difference between them and ordinary businesses has been so great as to constitute a difference in kind rather than in degree; and the regulation of the public callings has always been therefore a distinct topic of the law. The law has always imposed an affirmative duty of action upon those who professed a public employment. This distinction of the public callings from the private callings was often of the utmost importance in our early common law. Indeed, whether the defendant was in a common employment or not made more difference in the success of the plaintiff's action or its failure than it does to-day. And although many of the decisions which make the distinction are long since obsolete in one way or another, the subsequent developments in the law in no manner affect the force of these cases in establishing the difference between the obligations of those in public employment and those in private business as a fundamental fact in the legal system.

§ 3. Conditions of business in the middle ages.

In the middle ages, and long thereafter, the necessity of furthering the well-being of the people and protecting them from oppression was enough to justify State interference. In the England which we see through the medium of our earliest law reports, the mediæval system was at its highest point of

development, hardly affected as yet by the modern ways of arranging things which were just in their beginnings. The older policy had been one of almost universal regulation. Most of the trades in the towns were restricted by the gild system. Under this system the services to be rendered to the public in the trades were governed by certain codes of by-laws; but these by-laws were continually declared void by the local courts if they were oppressive. In the country at the same time there were to be met certain privileges in carrying on business in connection with the manorial system. Some businesses required the investment of more or less capital in constructing a plant, as the bake-house and the mill. It had been necessary at the outset that these should be provided by the lord of the manor and the seignorial ban covered these, the lord granting franchises to certain persons. Those who conducted these businesses were bound to serve all fairly or answer for it to the courts of the manor. But upon the whole the ordinary trades and crafts were more freely open to any one in the country than in the towns, with their craft gilds and merchant gilds.

The fundamental principles in the mediæval order, taken as a whole, were, therefore, the establishment of special privileges and the consequent system of State regulation, both in respect to service and in respect to price; and it is clear upon all the evidence that these principles of State regulation were put into practice by the special tribunals and the regular courts in a thorough and intimate manner. For these reasons the mediæval system may well be described as a consumer's policy. Under the mediæval system industrial activity was limited by various restrictions. The ideal held was a society in which all things were ordered. The conception was that every man had a right to a place in this established order according to his rank, a state of affairs by most men desired. Each person was held bound to perform his own part; no person, therefore, should be allowed to interfere with the employment of another.

Of course, the modern theory is altogether different. A state of free competition is considered to be for the best interests of society; and, therefore, in our time almost every business is open to almost every man. And yet at all times in economic history both restriction and freedom are to be found in the law. The proportion, however, changes greatly. In one epoch there is much legal limitation, with little freedom left; in another age there is almost universal competition, with some little franchise to be found. And the rule will generally hold true that the more the natural laws of competition regulate service and price, the less the State need interfere in these respects; but conversely when competition ceases to act efficiently State control becomes necessary.

§ 4. Parliamentary regulation of rates.

Not only did the law regulate business indirectly, through the courts, parliament itself frequently regulated prices of necessaries of life by direct legislation. The great staples, like wool and food, were habitually regulated in this way, and the employment and the price of labor was a subject of statutory provision. Thus, in 1266, Henry III., after reciting former statutes to the same effect, regulated the price of bread and ale according to the price of wheat and barley, and forbade forestalling; that is, cornering the market.[1] In 1344 the ordinances fixing the export prices of wool were repealed after some years of trial.[2] In 1349 all laborers were obliged to serve for the customary wages, and "butchers, fishmongers, regrators, hostelors (i. e., innkeepers), brewers, bakers, poulterers, and all other sellers of all manner of victuals," were bound to sell for a reasonable price.[3] These statutes continued in force throughout the middle ages, and until after the settlement of America.

1 51 Hen. 3, Stat. 1.
2 18 Ed. 3, cap. 3.
3 23 Ed. 3, cap. 1.

§ 5. Examination of early public employments.

Since the modern law of public employments is a survival of a much more generally applicable principle of the mediæval law, it will be instructive to examine some of the early applications of the mediæval principle, which involved the recognition of the common calling as a thing apart from the private calling, presenting different conditions, and involving the necessity therefore of further law than that which suffices to regulate ordinary businesses. In these earliest examples there are certain elements in the situation which are so characteristic that the realization of them should lead to some conception of the nature of the public employment and the law necessary for its regulation. It would be too much to expect to see the law finally settled in those times, to find modern aspects of the problem altogether anticipated; but it is not too much to hope to discover some meaning in the cases, some definition of the first principles involved in the law of public employment.

§ 6. The common surgeon as an illustration.

One decision in point is an anonymous suit in 1441.[4] This was a writ of trespass on the case against one R., a veterinary surgeon, to the effect that the defendant had undertaken to cure the plaintiff's horse with skill and care of a certain trouble, and that he then so negligently and carelessly gave medicines that the horse died. In the opinion of Judge Paston may be seen the ground upon which the court proceeded: "You have not shown that he is a common surgeon to cure such horses, and therefore although he has killed your horse by his medicines, you shall have no action against him without an assumpsit." The court accordingly decided that a traverse of the assumpsit made a good issue. The significance of the assumpsit in those days was that when one man had authorized another to deal with

[4] Y. B. 19 H. VI, 49, 5.

personal property in the course of private business, the latter was under no legal liability to use care, unless he had made such a special undertaking and entered upon the performance of it. In the public businesses on the other hand the legal obligation to perform the act with proper skill was well established.

In England of the fifteenth century such professional men were few. This was in part due to the rudeness of the time, which made education unusual, and produced more necromancers than physicians. It was in part to be traced to the restrictions which the mediæval system had put upon the practice of the profession. At all events, in the common case only one surgeon would be at hand in any one district, so that if he should refuse to bleed the patient, all might be lost. Such being the situation, it is easy to understand why the law was so stern in the case of the common doctor who undertook to cure all who came, requiring him to act with care although he promised none, and giving the patient an action although he had submitted himself to the operation, if the doctor was negligent. It was the unusual situation which produced this extraordinary law.[5]

§ 7. The tailor as an illustration.

Some light upon the position of the mediæval tailor before the law we obtain from an opinion of Brian: "I know well, if I put a robe with a tailor to be made, or if I come to a common inn or a common smith with my horse, in all cases of the sort I may have my robe lying in the tailor's shop as long as I please (without its being subject to distraint); for he is compelled by the law to do it, and he may by the law detain until he be satisfied for the making."[6]

[5] See Y. B. 43 Ed. III, 6, pl. 11; Y. B. 3 H. VI, 36, pl. 33; Y. B. 19 H. VI, 49 pl. 5; Y. B. 11 Ed. IV, 6 pl. 10; 1 Roll. Abr. 10 pl. 5; Slater v. Baker, 2 Wils. 359 (1767); Sears v. Prentice, 8 East, 348 (1807).

[6] Y. B. 22 Ed. IV, 49 pl. 15.

It is rather surprising to the modern mind to imagine a state of society where there was not competition enough among tailors. There has been free and lively competition for so long that the tailor at a very early time dropped from the list of public callings and is mentioned in the books no more as a member of this exceptional class of public servants.

§ 8. The smith as an illustration.

Another instance in shown in an anonymous note in 1450:[7] "Note that it was agreed by all the court that where a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case, notwithstanding no act is done; for it does not sound in agreement. But where a carpenter makes a bargain to build me a house and does nothing, no action on the case, because that does sound in agreement." The meaning of this is that in those days no action lay upon a mere agreement, and a promisor need not perform; but that one who undertook a public employment must perform, whether he agreed or not. Here again the obligation resting upon those in common callings to serve all that apply is the basis of the case.

Why is this entire distinction made between the wayside smith and the journeyman carpenter? Because again the economic conditions of these trades were so different. So far apart were they in the eyes of the courts, that the ordinary law was protection enough for those that dealt with the carpenter, while an extraordinary law was needed in behalf of those that came to the smith. There were builders enough to make the situation in that business one of virtual competition, so that there was no hardship; but the farriers were so scattered that the conditions were those of virtual monopoly, which required therefore a special code, else a good horse might be ruined for

[7] Keilway 50, pl. 4.

want of a shoe if the wayside smith should take it into his head to refuse to serve.[8]

§ 9. The innkeeper as an illustration.

One of the most noteworthy of the common callings by the early law was that of the innkeeper. In another anonymous report in 1460,[9] Moile, Judge, is quoted as saying: "If I come to an innkeeper to lodge with him, and he will not lodge me, I shall have on my case an action of trespass against him; and in the same way if I come to a victualler to buy victual, and he will not sell, I shall have an action of trespass on my case against him; and still in such cases if he will bring a writ of debt against me on such duty I shall have my law."

This stands to the present day as the law of the land The innkeeper is in a common calling under severe penalty if he do not serve all that apply, while the ordinary shopkeeper is in a private calling free to refuse to sell if he be so minded. The surrounding circumstances must again explain the origin of this unusual law. When the weary traveller reaches the wayside inn in the gathering dusk, if the host turn him away what shall he do? Go to the next inn? It is miles away, and the roads are infested with robbers.

The whole system of travel and communication in rural England, at the time the law of inns was in the making, required, as has been seen, that the weary traveller should find at convenient places beside the highway houses of entertainment and shelter to which he might resort during his journey for food, rest and protection. The ordinary laws of supply and demand would lead to the establishment of such houses by the roadside at places which would sufficiently serve the public convenience; but those laws could not be trusted to secure to each individual

[8] See Y. B. 46 Ed. III, 19 pl. 19; Y. B. 2 Ed. IV, 13 pl. 9; Y. B. 22 Ed. IV, 9 pl. 15; Y. B. 21 H. VI, 55 pl. 12; Keilway 50, pl. 4.

[9] Y. B. 39 H. VI, 18 pl. 24.

the benefit of the food and shelter therein provided. The desire for gain is not the only passion which moves men, innkeepers or others. Hatred, prejudice, envy, sloth or undue fastidiousness might influence an innkeeper to refuse entertainment to a traveller, even though he could pay his score. The supply of food and shelter to a traveller was a matter of public concern, and the house which offered such food and shelter was engaged in a public service. The law must make injustice to the individual traveller impossible; the caprice of the host could not be permitted to leave a subject of the king hungry and shelterless. In a matter of such importance the public had an interest, and must see that, so far as was consistent with justice to the innkeeper, his inn was carried on for the benefit of the whole public; and so it became in an exact sense a public house.[10]

§ 10. The carrier as an illustration.

From the earliest times it has been agreed that the common carrier of goods is in a public employment. A statement of the early law is to be found in one of the leading cases on carriers, Jackson v. Rogers,[11] in 1683. "This was an action on the case, for that whereas defendant is a common carrier from London to Lymmington *et abinde retrorsum,* setting it forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire. And held by Jeffries, C. J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same. Note, that it was

[10] See Y. B. 11 H. IV, 45 p. 8; Y. B. 22 H. VI, 21 pl. 38; Y. B. 22 Ed. IV, 49 pl. 15; Y. B. 10 H. VII, 8 pl. 14; Y. B. 14 H. VII, 22 pl. 4; Keilway 50 pl. 4.

[11] 2 Show. 23.

alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict."

Again the explanation must be sought in the history of the times. In Plantagenet England the population lived in communities apart from each other, so that small attention was paid to the roads, which were no more than trails winding through the wilderness. No cart could pass over them, only pack animals, and so many were the bands of outlaws in the greenwood that no man might with safety traverse these paths alone. The transportation of goods was, therefore, given over to the carrier, who travelled oftentimes with trains of pack animals and a considerable company. It was also the fact that one carrier or few would thus pass over the same roads between the same towns, because the traffic was still comparatively small, as England had not yet changed from a local economy where each community was sufficient to itself, into a national economy which involved interchanges of goods between distant markets. The conditions surrounding transportation were those of virtual monopoly. The merchant had therefore the protection of the law, a protection without which he was at the mercy of the carrier with whom circumstances forced him to deal without a chance for choice.[12]

Another reason why cases against innkeepers and carriers appear in our earlier reports of cases from the King's Courts while there were no cases against weavers or spinners for example, was because innkeeping and carrying were no part of the gild system in the towns, nor of the manorial system in the country; those who conducted these businesses, therefore, were free from regulation by peculiar law and special courts, and it became necessary for the common law and the national courts to take charge of the situation for the protection of the public.

[12] See Rich v. Kneeland, Hob. 17; Kenrig v. Eggleston, Al. 93; Nichols v. More, 1 Sid. 36; Morse v. Slue, 1 Vent. 190.

TOPIC B.—PERSISTENCE OF STATE REGULATION.

§ 11. Partial continuance of regulation to modern times.

The irresistible advances of the modern competitive system gradually worked the destruction of the mediæval organization of industry. Great, however, as was this change from the old economic theory to the new, it was not complete. There had been no revolution, but merely a swinging of the pendulum. General but not absolute restriction of the freedom of trade was the policy of the middle ages; general freedom of trade, with the restriction of certain exceptional occupations, has become the policy of modern times.

It is almost a truism that the spirit of the age molds its law. This is obviously true of that small proportion of the law which is made in the form of statutes by a legislature. But it is true as well of unwritten law, of which the decisions of courts are at once the cause and the evidence. The briefs are drawn and the arguments are made by members of the bar, and the decisions are reached by the judges; and judges and lawyers alike are members of the community and share its spirit and its thought. The age's ideal of right is their ideal, the method of thought about justice which is prevalent at the time is their method of thought, too; and it therefore follows that in working out legal problems, both bench and bar work along the lines prescribed by the spirit of the age in which they live.

Nowhere is the influence of the spirit of the time on the common law more evident and more potent than in this question of the regulation of common trades. Following the change in economic thought which has been described, the judges in modern days have been saying as to the ordinary activities of life, that it lies with the tradesman to conduct his business as he pleases, and at his own price. Not so, however, in those exceptional trades which are known as the common callings. In the case of these callings, the law continues to regulate them as it

has done in the past; and those who undertake to carry on such callings continue to be compelled to serve all that apply at a reasonable rate. The regulation of rates in the common or public callings by the government by means of the common law is therefore the persistence of a power which the State has exercised from ancient times to regulate prices when it is necessary for the protection of the public from extortion. In earlier times, when most trades were privileged, there was a correspondingly great amount of regulation. To-day when in most businesses the field is free to all, it will be true generally that the ordinary processes of competition will produce with more or less certainty adequate supply at fair prices. But in the businesses affected with a public interest there will be found usually a virtual monopoly; so that it will be necessary for the law to see to it that the public are properly served at reasonable rates.

§ 12. Persistence of principle accompanying change of conditions.

It will be noticed that the principle of law which permits the regulation of these callings has not been abandoned in the smallest degree, though the conditions calling for its application in modern times have greatly changed. Whenever the public is subjected to a monopoly, either because of legal grant, as in the case of the mediæval gilds and markets, or because of the actual conditions of life, as in the case of the village surgeon or smith, the power of oppression inherent in a monopoly is restricted by law—whether by the common law, applied by the courts or by special legislation. Whenever on the other hand competition becomes free, both in law and in fact, the need of governmental regulation ceases; public opinion ceases to demand such regulation, and the law withdraws it. In this way certain of the trades and classes of trades just enumerated having become competitive, the law has ceased to regulate them, not be-

cause of a change of legal principle but because of a change in actual economic conditions.

§ 13. Applications of the principle to commodities in new countries.

An interesting application of this principle in modern times by means of legislation occurred in the American colonies at the time of their settlement. In a new colony life is a serious thing, the necessaries of life are scarce, and the needs of the public are pressing. The conditions are ideal for a distressing "cornering of the market" by merchants. Accordingly, though most of the statutory regulations of trades and prices had either been repealed or had become obsolete in the mother country, the colonies at an early time passed statutes regulating the prices of staple commodities. Thus in Massachusetts the price of bread was regulated in 1646;[1] the packing of beef and fish in casks was regulated at about the same time;[2] the price of beer in 1645;[3] the price of labor as early as 1630.[4] In 1635 shopkeepers and merchants were forbidden to charge excessive prices.[5] In Plymouth colony the price of beer was limited in 1636,[6] and the price of boards in 1668.[7] In Virginia the price of tobacco was fixed. As it was in those colonies so it was probably in every one. Corn and tobacco, beer and bread, beef and boards, all that was most important for the colonists to have was regulated as a matter of course by the assemblies of the time.

1 Mass. Colonial Laws (1672), p. 8; and see Ancient Charters & Laws, p. 752 (Act of 1720).
2 Colon. Laws, p. 16.
3 Ibid, p. 80.
4 Ibid, p. 104.
5 Ibid, p. 120; see, also, the Act of 1675, ibid, p. 236.
6 Plymouth Colony Laws, p. 46.
7 Ibid, p. 156.

§ 14. Monopolies established by patents from the crown.

Toward the end of the Sixteenth century the grant of patents to reward some favorite or other was becoming so great an abuse as to shock the public conscience. The judges as usual were influenced by this public feeling; they could not but see the discrepancy between the general theories then current and the too frequent practices of their sovereigns. They could not but recognize the change in the theory of society. They knew as all knew that free competition was to be the basis upon which the industrial order of the future was to be founded. To them therefore the growing practice of the Tudor sovereigns in granting monopolies by patent to deal in this and that commodity, oil, yarn, glass and tin, and even in leather, paper, coal and steel, came as a great shock. They chafed at being obliged to recognize these grants, knowing that the undercurrent of public opinion was against monopoly; though there was, no doubt, some policy in these grants to encourage and promote new trades and large enterprises, whereby the system of patents might have been defended, if people would have listened.

The great Case of Monopolies[8] shows an extraordinary prejudice against that infamous patent of the crown granting the sole making of cards within the realm to some favorites of her Majesty. So outraged was the court when this patent was pleaded that they were led to defy even a Tudor sovereign in the exercise of her undoubted prerogative, and to decry monopolies. Popham, Chief Justice, and the whole court resolved, to quote some of their own words: "That it is a monopoly, and against the common law. All trades as well mechanical as others which prevent idleness (the bane of the commonwealth) and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance to serve the Queen when occasion shall require are

[8] Darcy v. Allen, 11 Rep. 84 (1603).

profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is against the common law and the benefit and liberty of the subject."

Splendid as was this judicial outburst, it was nevertheless so clearly against the law and the constitution that it has furnished no precedent. Never since that time have the courts attempted to declare a franchise void when in point of law and constitution its case was perfect. At the same time as the agitation against the granting of monopolies continued until this wrong with many others was redressed by the deposition of the Stuarts, never since the Seventeenth century has the government of any country that derives its traditions from England attempted to grant a monopoly to any of the usual trades.

§ 15. Grant of franchises in modern times.

Exclusive privileges may be found still in modern times, but only in the exceptional businesses. Of late years the value of the creation of franchises as a method of dealing with the public service situation has been appreciated. This is shown in a modern definition of the nature of the franchise. In California v. Pacific Railroad,[9] the State Board of Equalization of California included in the assessment of the Pacific Railroads which had been chartered by Congress a large sum for the franchise. The constitutional question was thereupon raised whether it was possible for a State government to tax in this way an instrumentality of the federal government. In deciding this question the court was necessarily led to a determination of the nature of the modern franchise, which makes the case useful for our present purposes.

Mr. Justice Bradley said: "What is a franchise? Under English law Blackstone defines it as a royal privilege or branch of the king's prerogative subsisting in the hands of a subject.

[9] 127 U. S. 113, 32 L. Ed. 150 (1888).

Generalized and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or power of a public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents, acting under such conditions and regulations as the government may impose in the public interest and for the public security. Such rights and powers must exist under every form of society."

Experience has shown that the truth of the matter is that the imposition of an occasional monopoly may be advantageous in the ordering of the industrial system. The policy of the grant of an exclusive franchise has appeared in various circumstances. More frequently than formerly this is the method taken by the modern State for dealing with the troublesome problem of the public utilities. For reflection has shown that many of the public works can be conducted with advantage only upon the basis of exclusive franchise. The telephone system is a conspicuous instance; in that a single system is the only basis upon which a satisfactory service can be rendered to the community. And in a less obvious case the waste by duplication of plants is so scandalous that the ultimate benefit to the community in giving an exclusive franchise to one gas company, for example, must be admitted when the futility of expecting any permanent competition has been so long exposed. Indeed it is now recognized by many advanced thinkers that it is necessary for the perpetuity of competitive conditions in general that in the particular instances of monopolistic conditions the State should proceed at times to establish a legal monopoly, and then apply to that situation strict regulation, such as the exigency demands.

§ 16. Persistence of the class of public callings.

Thus the need of regulation has not ceased in modern times, nor has the law of public callings become a mere exceptional doctrine, an anomaly unfortunately lingering in the case of a single important occupation. During the nineteenth century the common carrier, after the introduction of the railways, became of such consequence in the industrial organization that the other public callings were overshadowed and have been at times almost lost to sight, while in the fifteenth century barber and surgeon, smith and tailor, innkeeper and victualler, carrier and ferryman were of more or less equal concern to the law. That these callings were put into a class by themselves, that an unusual law was applied to them, that this was sternly enforced, and that it was elaborately worked out—all these things cannot be without their modern significance. The common law persists from age to age, and though the instance of its rules may be seen to change as old conditions pass away and new conditions arise, its fundamental principles remain. The cases just under discussion are illustrations of the course of events. Barber, surgeon, smith, and tailor are no longer in common calling because the situation in the modern market does not require it; but innkeeper, victualler, carrier and ferryman are still in that classification, since even in modern trade the conditions require them to be so treated. The class of public callings is capable of indefinite extension whenever new conditions bring new employments within its scope.

§ 17. The introduction of improved highways by private enterprise.

Just before the beginning of the nineteenth century the need for transportation of persons and goods more quickly and more cheaply between distant communities began to outgrow the facilities for commerce then at the disposal of the public. The solution of this question became one of the most pressing eco-

nomic problems of the early nineteenth century, engaging the attention of statesmen, as every great commercial problem must. The scheme gradually worked out was for a system of improved turnpikes all over the country supplemented by more frequent bridges, and between the most important markets the construction of canals and the development of existing waterways. The theory of the statesmen who dealt with the conditions under which these works of internal improvement should be constructed was of course that private enterprises were better than State ownership. However, they were willing to meet the need of the time for immediate construction of these expensive works by grants from the State treasury or by guaranty of the bonds of the private companies. Since these improved highways were considered like other highways, public in character and open to all, even though maintained by private companies which were given the right to charge tolls, the propriety of such State aid was apparent enough.

§ 18. Toll-bridges and turnpikes as examples.

Toll-bridges and turnpikes were from their institution treated as public in character because of their obvious status as highways. Some of the early cases were extraordinarily strict as is shown in the extreme case of Thompson v. Matthews.[10] The defendants were ordered to show cause why an injunction should not issue, restraining them from transporting or causing to be transported across the bridge from Harlæm across the Harlæm river any marble or stone in quantities exceeding at one time or in any one load the weight of two tons, until the further order of the court. The bill in the cause was filed by the owners and proprietors of the bridge.

The Vice-Chancellor said: "The motion for an injunction cannot be granted. The road across the bridge is undoubtedly

[10] 2 Edw. Ch. 212 (1834).

a highway, though all persons and carriages passing must pay a toll; but, still, it is a public highway. The affidavits in opposition take very much from the force of the allegations in the bill. But this is a case in which the parties have legal rights. The bridge is a public one. If persons take improper loads and the bridge has been properly constructed, then the owners of it have a remedy by a special action on the case or in trespass for damage done; while, on the other hand, if passengers and their property should sustain an injury by a breaking from ordinary loads, the owners must respond in damages. The law affords a reciprocal remedy in all such cases; and I shall leave the parties to their legal right. It is true this court has jurisdiction to prevent irreparable injury; but the injury is not irreparable, where damages, as here, can be ascertained without difficulty, and compensation made in money. And I would observe, with respect to the tolls, that no equity arises from the circumstance of the complainants not being enabled to charge more than nine cents for a heavy load. This is a matter for the legislature; and the complainants will have an opportunity of applying for an amendatory act, raising their tolls, before the contract, which the defendants have entered into and which requires this large quantity of marble to be transported, shall have been completed." [11]

§ 19. Canals and waterways as illustrations.

Canal traffic was the most important feature in inland transportation before the era of the railways, and indeed it is still

[11] A toll bridge is a public highway, as is held in many cases, a few of which are subjoined: Covington & Lexington Road Co. v. Sandford, 164 U. S. 596; 41 L. Ed. 566, 17 Sup. Ct. 198 (1896); McCleod v. Savannah, etc., R. Co., 25 Ga. 445 (1858); Bussey v. Gilmore, 3 Me. 191 (1824); Central Bridge Corp. v. Sleeper, 8 Cush. (Mass.) 324 (1851); State v. Hannibal, etc., R. Co., 97 Mo. 348, 10 S. W. 436 (1888); People v. San Francisco, etc., R. Co., 35 Cal. 606 (1868); Pittsburg, etc., Pass R'y Co. v. Point Bridge Co., 165 Pa. St. 37, 30 Atl. 511, 26 L. R. A. 323 (1894); Hasson v. Venango Bridge Co., 1 Pa. Dist. Rep. 521, 11 Pa. Co. Ct. Rep. 383 (1892).

a not inconsiderable item. It never seems to have been doubted that those who managed the canals were obliged to permit all who wished to pass upon payment of established tolls. The reason for this undoubtedly was that these canals were conceived of as highways. This is said squarely in one case involving the duty of the canal companies to serve all that apply. Buffalo Bayou Ship Channel v. Milby & Dow.[12] In that case the canal company turned a vessel back upon the ground that tugboat towing her owed tolls. The court ruled that this refusal was wrongful.

Mr. Justice Walker said, upon the appeal: "The relation which the plaintiffs and the defendant company occupy to the subject matter out of which arises the damage, must, we think, enter as an important element in determining the question presented. This water channel or cut, owned and controlled by the defendant under its charter from the State was a public highway for vessels beyond question; and as such the owners of all vessels had a right to regard and to treat it, using it at their pleasure, subject to the lawful conditions imposed upon them therefor. A toll bridge, built in pursuance of an act of the legislature, is a public highway; manifestly, this ship channel was so too." [13]

[12] 63 Tex. 492, 51 Am. Rep. 668 (1885).

[13] In the following cases, among many others, canal companies are treated as public service companies: U. S. v. Ormsbee, 74 Fed. 207 (1896); Savannah & O. Canal Co. v. Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. Rep. 43, B. & W. 62 (1893); People v. Kankakee River Imp. Co., 103 Ill. 491 (1882); Sheldon v. New Orleans Canal Co., 9 Rob. (La.) 360 (1844); Stewart v. Lehigh Valley Ry., 38 N. J. Law, 505 (1875); Farnsworth v. Groot, 6 Cow. (N. Y.) 698, B. & W. 213 (1827); Pennsylvania Coal Co. v. Delaware Canal Co., 31 N. Y. 91, B. & W. 446 (1865); Com. v. Delaware Canal Co., 43 Pa. St. 295 (1862); McArthur v. Green Bay Canal Co., 34 Wis. 139 (1874); Staffordshire Canal Co. v. Trent Navigation Co., 6 Taunt. 151 (1815); Case v. Midland Ry., 27 Beav. 247 (1859).

TOPIC C.—THEORY OF LAISSEZ FAIRE.

§ 20. Freedom of individual effort limiting the application of the principle.

As individual freedom of action is encouraged by law and the practice of *laissez faire* prevails in the business world, the occasions for the application of the principles of law regulating public callings become fewer. This condition of affairs prevailed to a remarkable extent in the United States during the first half of the nineteenth century. The English system of excessive legislative regulation by Parliament having become distasteful, the constitutions of the original States and of the United States carefully limited the power of legislatures to interfere with the ordinary affairs of business. Regulation of private affairs by the law may be said to have been at a minimum in the United States in the first half of the nineteenth century. At the same time there was in the business world a condition of almost absolutely free competition. As a result, the law of public callings had a very narrow application.

The principles of State regulation were not altogether forgotten; even at this period it was recognized that there were some lines of business activity over which the public had some control. Common carriers, a least, must furnish carriage to everyone who applied; must charge for the carriage only a reasonable rate; and could not, even by a contract freely entered into, escape liability for negligence. Innkeepers, also, have always been recognized as subject to legal control. But as late as a quarter of a century ago it was a generalization often made, and made not without justification, that all of the common callings were related in one way or another to carriage. That canals and waterways, as also turnpikes and toll-bridges were facilities for carriage was held to be obvious. Even the inns, it could be said, were connected with travel just as the warehouses were connected with shipment; and in this way the

generalization was kept true. The introduction of the telegraph did not disturb the classification, it was held in so many words to be a carrier of intelligence.

§ 21. Early decisions as to gas supply an illustration.

When the first gas works were constructed, therefore, they had no place in this classification, for it was not possible to think of them as public carriers. And although those who dealt with them soon began to feel the need of the protection of the law, the courts at first refused to interfere in behalf of the public. Thus in Paterson Gas Light Company v. Brady,[1] where the plaintiff complained that although his buildings were located upon the lines of the main pipes of the defendant company, it refused to furnish him with gas although he was willing to pay the fixed price, the upper court held that the action should have been dismissed, Mr. Justice Elmer saying: "The language of the charter is throughout permissive, and not compulsory. The company may organize, may make and sell gas, or not, at their pleasure; and I see no more reason to hold that the duty of doing so is meant to be imperative, than to hold that other companies incorporated to carry on manufactures, or to do any other business, are bound to serve the public any further than they find it to be to their interest to do so. It was earnestly insisted, on the argument, that the community have a great interest in the use of gas, and that companies set up to furnish it ought to be treated like innkeepers and common carriers, and that, if no precedent can be found for such a decision, this court ought to make one. But that there is no authority for so holding in England or America, where companies have been so long incorporated for supplying water and gas to the inhabitants of numerous towns and cities, affords a

[1] 3 Dutch (N. J. Law), 245, 72 Am. Dec. 360 (1858).

strong presumption that there is no principle of law upon which it can be supported." [2]

§ 22. Early decisions as to waterworks an illustration.

But already the courts were showing an inclination to protect the public in their relations with these public companies. In a case[3] regarding the constitutionality of the grant of eminent domain to a waterworks company, decided about the middle of the nineteenth century by Chief Justice Shaw, he worked out a duty to supply the public by reason of the enabling clauses in the charter of the company in a way which would be plainly unjustifiable unless there were an underlying public duty. He said: "The supply of a large number of inhabitants with pure water is a public purpose. But it is urged, as an objection to the constitutionality of the act, that there is no express provision therein requiring the corporation to supply all families and persons who should apply for water on reasonable terms; that they may act capriciously and oppressively; and that by furnishing some houses and lots and refusing supply to others, they may thus give a value to some lots, and deny it to others. This would be a plain abuse of their franchise. By accepting the act of incorporation, they undertake to do all the public duties required by it. When an individual or a corporation is guilty of a breach of public duty by misfeasance or non-feasance, and the law has provided no other specific punishment for its breach, an indictment will lie. Perhaps, also, in a suitable case, a process to revoke and annul the franchise might be maintained."

[2] Accord were: McCune v. Norwich Gas Co., 30 Conn. 521, 79 Am. Dec. 278 (1862); Com. v. Lowell Gas Co., 12 Allen, 75 (1866). The modern decisions establishing that the gas companies are in public calling are discussed in § 59, *infra*.

[3] Lumbard v. Stearns, 4 Cush. 60 (1849). The modern cases establishing that the water companies are in public calling are discussed in § 57, *infra*.

§ 23. Cotton press as a modern illustration.

The conservative attitude in dealing with public employment is to consider all doubtful cases as private businesses, free to conduct their affairs as they please. But of course in such cases, if the legislature acts, the courts must accept the legislative declaration unless that is so unreasonable as to be unconstitutional. The courts that take the conservative view upon this general problem of State regulation of the industries go no further than this, after all. Ladd v. Cotton Press Company[4] is one such case. There the company refused to treat its patrons alike, charging some more than others.

Mr. Chief Justice Moore held that so far as the common law of Texas went the company might do what it pleased: "The business of warehousing and compressing cotton is free to every one who wishes to engage in it. No grant or franchise need be obtained from the State to authorize those desiring to do so to embark in this character of business. It is not one of the employments which the common law declares public. Nor is it claimed to have been made so by statute. And we know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici* merely by reason of its extent. If the magnitude of a particular business is such, and the persons affected by it so numerous, that the interest of society demands that the rules and principles applicable to public employments should be applied to it, this would have to be done by the legislature if not restrained from doing so by the constitution before the demand for such an use could be enforced by the courts."

§ 24. Stockyards as a modern illustration.

This same conservative attitude is shown by some courts in dealing with the stockyards, another rather doubtful case. In a

[4] 53 Texas, 172 (1880).

recent decision by the United States Supreme Court, Cotting v. Kansas City Stock Yards Company,[5] a variety of reasons were urged to show that the legislation of Kansas regulating stock yards and fixing their prices was unconstitutional, and the point upon which the legislation was finally declared to be void seems to be because it was discriminatory. But the suggestion is thrown out by Mr. Justice Brewer that although stock yards may be regulated by the State, perhaps the regulation ought not to be pressed so far as in the case of railways. To quote from his own language: "Tested by the rule laid down in Munn v. Illinois, it may be conceded that the State has the power to make reasonable regulation of the charges for services rendered by the stockyards company. Its stockyards are situated in one of the gateways of commerce, and so located that they furnish important facilities to all seeking transportation of cattle. While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and therefore must be considered as subject to governmental regulation. But to what extent may this regulation go? Is there no limit beyond which the State may not interfere with the charges for services of those who while not engaged in such service have yet devoted their property to a use in which the public has an interest? . . . And while in the present case by the decisions heretofore referred to he cannot claim immunity from all State regulation, he may rightfully say that such regulation shall not operate to deprive him altogether of the ordinary privileges of others in mercantile business." [6]

[5] 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, B. & W. 316 (1901).

[6] Acc. Delaware, L. & W. Ry. v. Central S. Y. Co., 46 N. J. Eq. 280, 19 Atl. 185 (1890).

§ 25. Conservative and radical views concerning the public services.

While it is generally agreed that a change has come over the spirit of our time, that State regulation is the prevailing philosophy of the people at the beginning of the twentieth century; it must be borne in mind that this has been the result of a gradual progress of thought, and that this progress has not affected all men or all lawyers equally. Now, as at all times, there are conservative lawyers and radical lawyers, the former as far behind the prevailing spirit of the time as the latter go beyond it. In every change of popular thought there have been laggards, and in every such change there have been those who are unable justly to estimate the true meaning of the change, and work beyond it into eccentricities in which the people will never follow them. We have, therefore, three general types of thought at every time; the conservatives, the moderates, and the radicals. And this is as true of legal as of economic thought. We shall therefore find many lawyers still holding conservative views as to the application of the law of public callings to modern conditions. They believe that railroad rates should be unregulated, except by the desire and power of the corporation; that the conductors of every business, however necessary to public welfare, should do whatever seems good in their own eyes. Some economists still tell us that the only way to get efficient service for the public is to allow the public service companies the right of exacting such rewards as they are able to get. There are still some lawyers who assure us that the spirit at least of the constitution requires that all persons and corporations be left free to get what they can out of the world. But in spite of these now obsolescent views there can be no question that the tendency to-day is to restrain in the interests of society all business which has obtained undue power.

TOPIC D.—GROWTH OF THE PUBLIC EMPLOYMENTS.

§ 26. Extension of the application of the principle in recent times.

As the prevalence of competitive conditions in business limits the application of the principles of public service law, so the prevalence of a condition of business combination extends their application. Such a condition is now prevailing. About a generation ago a change in commerical practice showed with remarkable distinctness the advantage of co-operation and combination. Great enterprises took the place of small ones, and great enterprises required co-operation and combination. As the people became accustomed to look upon combination as the price of success, they came more and more to regard it as a blessing rather than an evil; and public opinion has gradually turned away from the individualistic ideal until to-day it has been fairly discarded by the current philosophy. With the principle of combination as the spring of action has come a corresponding need of controlling the action of business combination itself for the good of the whole public. As the rights of the individual trader yield to the rights of the great corporation, so in the view of the man of this time, the rights of the corporation should in their turn yield to the rights of the whole people. The same spirit which fosters combination, fosters also control of the combination for the public benefit. The spirit of the present age, therefore, has come to be a spirit which demands that great business enterprises should be conducted in accordance with the requirements of society.

The positive law of the public calling is the only protection that the public have in a situation such as this, where there is no competition among the sellers to operate in its favor. So much has our law been permeated with the theory of *laissez faire,* which was but lately so prominent in the policy of our State, that the admission has been made with much hesitation

that State control is ever necessary. But the modern conclusion, after some bitter experience, is that freedom can be allowed only where conditions of virtual competition prevail, for in conditions of virtual monopoly, without stern restrictions, there is always great mischief. There is now fortunately almost general assent to State control of the public service companies, since it is recognized that the special situation requires a special law.

§ 27. Growth of the public service companies in late years.

As a result of changed business conditions and ideas, and of the great inventions which have constantly tended to increase the magnitude of business enterprises there has been in the last forty or fifty years a great growth of employments which have gained, if not a legal monopoly or at least some special legal privileges, at any rate, as a result of circumstances, a virtual monopoly in matters of public necessity. These public service companies are certainly the most considerable factor in modern commercial affairs.

A mere enumeration of some of the most important of the recognized public employments will demonstrate their overshadowing importance in modern business. The common carriers of passengers and goods by land and sea, ferries and bridges, warehouses and stockyards, the supply of gas and electricity for light, heat and power, telephone and telegraph, conduit and sewer, water supply and irrigation systems, pipe lines for oil and electrical transmission lines—one may judge from this incomplete list how large a proportion of the capital of the country is invested in the equipment to furnish these services, and how great are the annual payments which the public make to those who furnish them. As these public services are treated of as constituting a single class in the discussion which follows, it is thought well to discuss some test cases which show the basis upon which this class is made up.

§ 28. Grain elevators as an illustration.

Any discussion of the foundations of our industrial relations must begin and end with the case of Munn v. Illinois[1] since it is recognized that this case has within its view all public duties and all private rights which are established under our system of government. Upon the right understanding of this distinction depends the true conception of our general theory of the function of State regulation.

The facts of the case are worth careful examination. The General Assembly of Illinois in 1871 had passed a statute which provided a maximum rate beyond which no person should charge for the storage of grain in public elevators. The firm of Munn & Scott refused to obey the act, and accordingly were fined. They appealed the case from court to court until the Supreme Court of the United States was reached. The Supreme Court confirmed all the decisions which had been given below and decided against the defendant. The points to be noted are four. The elevator of Munn & Scott stood upon land bought by them by private treaty; they had no privileges in the public streets; they had no aid from the public treasury; they were not even incorporated. Here, then, is a case that raises the question without complication.

As a general problem, Mr. Justice Waite discusses it: "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise *De Portibus Maris,* and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a

[1] 94 U. S. 113, 24 L. Ed. 77, B. & W. 71 (1876).

public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."

In this case of the grain elevator experience shows that in a given community there are not usually competitive conditions; monopolistic conditions generally prevail. Why? Not by accidental coincidence, but by natural limitation. The facts are that in any given community the plots of ground upon which this business may be conducted with convenience and efficiency are few and concentrated. In the case of the Chicago elevator those are the lots which both border upon the river and are adjacent to the terminals of the railroads entering the city. Thus grain elevators because of the nature of the traffic must be placed in or near a definitely fixed point; and thereby they have a virtual monopoly over their business; their number cannot be indefinitely multiplied, and competition cannot effectively regulate their business. Since their business is necessary to the public, it therefore follows that they must serve the whole public. There are elements of publicity in the business of elevating grain which peculiarly affect it with a public interest. They are found in the nature and extent of the business, its relation to the commerce of the State and country, and the practical monopoly enjoyed by those engaged in it. The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.[2]

[2] Munn v. Illinois, *supra*, is undoubtedly one of the leading cases in American constitutional law. It has been cited with approval hundreds of times, both in the federal and the State courts. See Rose's Notes on U. S. Sup. Ct. Rep. vol. 9, pp. 21-55.

§ 29. Warehouses as an illustration.

This commanding position is always a badge of public calling, because it gives the upper hand. The most extreme case of this sort is Nash v. Page.[3] That case was a controversy between the proprietors of ten of the tobacco warehouses in the city of Louisville, and the appellants, twenty-seven in number, who were dealers in tobacco. It appeared that the appellants had been denied the right to make purchases of tobacco at the warehouses of which the defendants were the proprietors. Accordingly, they had applied to the chancellor for an injunction asking that these warehousemen be enjoined from refusing them permission to make purchases at their several warehouses, and from rejecting their purchases when making the highest bids for the tobacco offered upon the payment of such fees as were charged other buyers. The refusal was upon the basis of a restriction which had been lately attempted to members of the Board of Trade.

The opinion of Mr. Justice Pryor is one of the most significant on this subject: "Since the formation of the State government, the sale of this great staple has been fostered and protected by legislation. Such warehouses have always been regulated by law for the benefit of the producer as well as those who are proprietors of these warehouses, and the latter have assumed an obligation to the public which exists as long as they continue public warehousemen. It is conceded fact that more than five millions in value of tobacco annually find its way from the producer to the warehouses in that city. The greater part of this product is grown within the State, and the producer has almost of necessity to place his tobacco under the control of and for sale by these several warehousemen at public auction. All this tobacco must necessarily pass through these warehouses, subject to such charges as are reasonable and proper. Such a

[3] 80 Ky. 539 (1882).

public duty may be imposed on these warehousemen in express terms or by implication, but whether so imposed or not, it arises from the facts of the case. In this great tobacco centre the producer is restricted to these public warehouses, or rather these public warehouses have a mutual monopoly of the sales of tobacco at auction, and the fact that there is more than one or a dozen such warehouses cannot affect the question." [4]

§ 30. Associated Press as an illustration.

In various lines of business at the present time there are at most a few corporations, often one corporation, which have substantial control of the market in that industry. Whether these monopolistic conditions are real or fictitious, natural or accidental, is the question. A most interesting case that comes to mind at this point is Inter-Ocean Publishing Company v. Associated Press.[5] The plaintiff newspaper had regularly taken the news of the defendant bureau. One of the by-laws of the Associated Press forbade members from buying news of any other agency; notwithstanding which the plaintiff took specials of the Sun Publishing Association. Thereupon the Associated Press enforced its by-law against the plaintiff, which is the basis of this action.

Mr. Justice Phillips held the by-law bad: "The organization of such a method of gathering information and news from so wide an extent of territory as is done by the appellee corporation, and the dissemination of that news, requires the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering

[4] Acc. Pannell v. Louisville T. W. Co., 113 Ky. 630, 68 S. W. 662, 23 Ky. Law. Rep. 24 (1902).

[5] 184 Ill. 438, 56 N. E. 822, B. & W. 53 (1900).

the information that is centred in an association of the character of the appellee because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and if they are prohibited from publishing it or its use is refused to them, their character as newspapers is destroyed and they would soon become practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property." [6]

§ 31. Ticker service as an illustration.

This case of the Associated Press is supported by those decisions which treat the ticker service as public in its nature because of its momentary monoply in its distribution of quotations. In one case, Shepard v. Gold Stock and Telegraph Co.,[7] one such company made the rule that the quotations furnished were for the subscribers' own use. The court was asked to declare the regulation void.

[6] But see State v. Associated Press, 159 Mo. 410, 60 S. W. 91 (1900); Matthews v. Associated Press, 133 N. Y. 335, 32 N. E. 981 (1893).

[7] 38 Hun, 338, B. & W. 52 (1885).

Mr. Justice Pratt treated the question with discrimination: "Defendants are a public corporation under obligation to render their services impartially and without discrimination to all persons who comply with their reasonable rules. Yet the contract entered into by the parties is not to be disregarded, and such reasonable stipulations as it contains will be respected and enforced by the court. The contract provides as follows: These reports are furnished to subscribers for their private use in their own business, exclusively. It is stipulated that such will not sell or give up the copies of the reports in whole or in part, nor permit any outside party to copy them for use or publication. Under this rule subscription by one party for the benefit of himself and others at their joint expense will not be received. The stipulation is reasonable and not in conflict with the duty owed by defendants to the public."[8]

§ 32. The public services as virtual monopolies.

The extent to which a business is public is a matter of law to be determined by the courts upon the application of their own tried tests to the situation. Whether a business is public or not depends upon the situation of the general public with respect to it. Are there enough of such purveyors to serve the public? If so, there will be virtual competition; if not, there will be virtual monopoly. In all of the businesses discussed in this chapter competition, although from a legal point of view possible, is from the economic point of view improbable. So far as one can see, virtual competition is at an end in these great industries, and virtual monopoly will henceforth prevail. Therefore it must be said that the public has now an interest in the conduct of these businesses by their owners; they are

[8] Acc. New York & C. Exchange v. Chicago Bd. of Trade, 127 Ill. 153, 19 N. E. 855, 11 Am. St. Rep. 107, 2 L. R. A. 41 (1889); Frurman v. Gold & S. Tel. Co., 32 Hun (N. Y.), 4 (1884); Smith v. Gold & S. Tel. Co., 42 Hun (N. Y.), 454 (1886).

affected with a public interest, since these agencies are carried on in a manner to make them of public consequence. Therefore, having devoted their property to a use in which the public has an interest, they in effect have granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created. This is the application of the doctrine of Munn v. Illinois,—a principle above all others in our constitutional law.

§ 33. Overshadowing importance of the problem of rate regulation.

All people who come in touch with the problem of rate regulation by any method of approach are agreed as to its overshadowing importance. An extract from one judicial opinion[9] will serve to show what strong language it is necessary to use to give any idea of vital consequence of the general issue. "The administration of justice, said Webster, 'is the chiefest concern of man upon earth.' Within the scope of that function of government there is, perhaps, no single topic of greater magnitude or moment than controversies which arise in trade and commerce. Said Sir Walter Raleigh, 'Whosoever commands the trade of the world commands the riches of the world, and consequently the world itself.' In a material sense, and in our astonishing civilization, nothing is more important than the transportation of commodities sold or interchanged, and in transportation the stability and reasonable character of the rates charged therefor is scarcely less important than transportation itself. The three grand departments of government, legislative, executive, and judicial, are with steady and swerveless purpose enacting or enforcing laws to safeguard the rights of the general public, and as well that portion engaged in the

[9] Speer, J., in Tift v. Southern Ry., 138 Fed. 753 (1905).

business of transportation. The shippers are appealing to government to protect them against unwarrantable exactions by the carriers. Appeal may be made by the carriers to protect their interests from unremunerative rates to which they may be restricted by State or other local authorities. In either case complaint is heard and redress is given.[10] It is no longer doubtful that the question of the reasonableness of a rate of charge for transportation is eminently a question for judicial investigation."[11]

§ 34. Rate regulation at the present time.

But rate regulation is not a mere theoretical possibility, it is the present practice. As this discussion progresses from chapter to chapter it will be seen how firmly established is the law that those who are conducting a public business must charge no more than a reasonable rate, and how general is the legislation providing some method of revising the rates charged by the public service companies. At this moment this legislation is becoming more exacting; for the present tendency plainly is to do more by legislation than to provide for setting aside rates shown to be extortionate; it is to go further and permit the fixing of a new rate by the supervising authority. It can be predicted with confidence that there will be further advance along these lines until a complete system for fixing rates by governmental authority in place of the rates set aside will be established by legislation. This is the spirit of the times, and one who wishes the continuance of our present regime of private ownership of the public utilities will do well to strengthen the hands of those who are working to establish this system of State control over

[10] Citing Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014 (1894); Chicago, etc., Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970 (1890); Rose's Notes on U. S. Reports, vol 11, p. 946, *et seq.*

[11] Citing Justice Blatchford, in Chicago & St. Paul Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970 (1890).

the conduct of the public services. For if this systematic program to regulate effectually the charges of the public service companies fails of something like full success, there is no alternative but State ownership with its unknowable consequences. As matters stand to-day the advocates of State control are really the conservatives.

PART I.

Chief Characteristics of Common Carriage.

CHAPTER II.

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§ 41. Reasons for regarding carriers as in the public employment.

As has been seen, common carriage has for a long time been regarded as the typical and indeed almost the only public employment; and though the number of public-service companies has been greatly increased of late years, it still remains the most important of all. It is worth while, therefore, to examine the grounds upon which it has been supposed that the common carrier is engaged in a public employment; and in the course of that investigation to note the relation in which common carriage stands to other public employments. The most important characteristic of the law of public employment to-day is the right of the State to regulate the business, and thus to secure reasonable rates and fair service. The right of regulation is now widely exercised, but the legal justification for its exercise is often placed upon untenable grounds, which must first be examined.

TOPIC A.—LEGAL PRIVILEGES AS GROUND OF PUBLIC POSITION OF THE CARRIER.

§ 42. Power of eminent domain.

It is often urged that the reason a railway company can be regulated by law is because it is endowed with the right of eminent domain, and is therefore a quasi-public corporation. This reasoning seems, however, to be objectionable, because it is taking the effect for the cause. A legislature can give a railway company the right of eminent domain only because the

company, irrespective of the enjoyment of that right, is already in the service of the public; since private property can by the provisions of most of our constitutions be taken by eminent domain only for a public purpose.

In at least one early case [1] it was doubted whether the operation of a railroad was such a public enterprise as to justify the giving of eminent domain to it. In that case, Raleigh & Gaston Railroad v. Davis, it was finally decided that the right might be granted to the company, Chief Justice Ruffin disposing of the matter thus: "Upon the supposition that the legislature may take the property to the public use, it is next said that this taking is not legitimate, because the property is bestowed on private persons. It is true that this is a private corporation, its outlays and emoluments being individual property; but it is constituted to effect a public benefit by a means of a road, and that is *publici juris*. In earlier times, there seems to have been a necessity upon governments, or at least it was a settled policy with them, to effect everything of this sort by the direct and sole agency of the government. The highways were made by the public, and the use was accordingly free to the public. The government assumed the exclusive direction as well as authority, as if they chose to be seen and felt in everything, and would avoid even a remote connection between private interests and public institutions. An immense and beneficial revolution has been brought about in modern times by engaging individual enterprise, industry, and economy in the execution of public works of internal improvement. The general management has been left to individuals, whose private interests prompt them to conduct it beneficially to the public; but it is not entirely confided to them. From the nature of their undertaking and the character of the work, they are under sufficient responsibilities to insure the construction and preservation of the work, which is the great object of the govern-

1 Raleigh & Gaston Ry. v. Davis, 2 Dev. & Bat. (N. C.) 451 (1837).

ment. The public interest and control are neither destroyed nor suspended. The control continues as far as it is consistent with the interests granted, and in all cases as far as may be necessary to the public use. The road is a highway, although the tolls may be private property by force of the grant of the franchise to collect."

§ 43. Pipe lines as an example.

Upon the same principle it has been held that the right of taking property by eminent domain may be conferred upon a pipe line system. The right having been conferred by the legislature, the act was attacked as unconstitutional, because the taking was not for a public purpose.

In a West Virginia case,[2] Mr. Justice Moore said upon that point: "It has been decided, time and time again, and is therefore settled by the best authority, that the construction of railroads, turnpikes, canals, ferries, telegraphs, wharves, basins, etc., constitutes what is generally known by the name of internal improvements, and gives occasion for the exercise of the right of eminent domain. And other measures of general utility in which the public at large are interested, and which require the appropriation of private property, are within the power where they fall within the reasons underlying the cases mentioned. The charter granted to the West Virginia Transportation Company by special enactment of the legislature, shows that the object was to construct a line for the transportation of petroleum. The charter also established the maximum charges the company should make for transportation of oils. I cannot see the propriety of admitting a railroad or canal or aqueduct to be an internal improvement, and declare this tube highway not to be."[3]

[2] West Virginia Co. v. Volcanic Co., 5 W. Va. 382 (1872).

[3] See, also, Columbia Conduit Co. v. Com., 90 Pa. St. 307 (1879); W. Va. T. Co. v. Ohio R. Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527 (1883).

§ 44. Cemeteries as an example.

When the power of eminent domain is conferred on a private corporation, public necessity, it is clear, must be proved in every case; but public service must be shown also. Unless the management of the enterprise undertake to serve all that apply upon reasonable conditions, the public have no interest in the promotion or conduct of the enterprise, its success or failure; and in such a case the Constitution forbids the taking of private property. An unusual decision in point is the case of Evergreen Cemetery Association v. Beecher,[4] which arose out of a complaint asking leave to take land for burial purposes by the right of eminent domain.

In sustaining a demurrer to the petition, Mr. Justice Pardee discussed the general problem along these lines: "The safety of the living requires the burial of the dead in proper time and place; and, inasmuch as it may so happen that no individual may be willing to sell land for such use, of necessity there must remain to the public the right to acquire and use it under such regulations as a proper respect for the memory of the dead and the feelings of survivors demands. In order to secure for burial places during a period extending indefinitely into the future that degree of care universally demanded, the legislature permits associations to exist with power to discharge in behalf and for the benefit of the public the duty of providing, maintaining and protecting them. The use of land by them for this purpose does not cease to be a public use because they require varying sums for rights to bury in different localities; not even if the cost of the right is the practical exclusion of some. Corporations take land by right of eminent domain primarily for the benefit of the public, incidentally for the benefit of themselves. As a rule men are not allowed to ride in cars, or pass along turnpikes, or cross toll-bridges, or have grain ground at

[4] 53 Conn. 551, 5 Atl. 353, B. & W. 26 (1885).

the mill, without making compensation. One man asks and pays for a single seat in a car; another for a special train; all have rights; each pays in proportion to his use; and some are excluded because of their inability to pay for any use; nevertheless, it remains a public use as long as all persons have the same measure of right for the same measure of money.

"But it is a matter of common knowledge that there are many cemeteries which are strictly private; in which the public have not, and cannot acquire, the right to bury. Clearly the proprietors of these cannot take land for such continued private use by right of eminent domain. The complaint alleges that the plaintiff is an association duly organized under the laws of this State for the purpose of establishing a burying ground; that it now owns one; that it desires to enlarge it; and that such enlargement is necessary and proper. There is no allegation that the land which it desires to take for such enlargement is for the public use in the sense indicated in this opinion." [5]

§ 45. Aid from taxation.

The basis of the right of public regulation is often said to be the receipt by the regulated company of aid from taxation. It is doubtless true, in general, that a business which receives public aid from taxation is a public business, and is subject to public regulation; but again the effect has been taken for the cause. Under our Constitutions State aid can be granted only for a public purpose; the public character of the enterprise does not result from the grant of State aid, for it must precede it in order to make the grant valid. "The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain or

[5] These cases, among others, show the public character of public cemeteries: Oakland Cemetery v. St. Paul, 36 Minn. 529, 32 N. W. 78 (1887); Re Deansville Cemetery Assn., 66 N. Y. 569, 23 Am. Rep. 86 (1876); Henry v. Trustees, 48 Ohio St. 671, 30 N. E. 1122 (1892); Cemetery Assn. v. Redd, 33 W. Va. 262, 10 S. E. 405 (1889).

of the right of taxation, to take private property without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes." [6]

It is only on the ground that the railroad is employed in the public service that it may receive State aid from taxation. "It was said that roads, canals, bridges, navigable streams and all other highways had in all times been matter of public concern; that such channels of travel and of the carrying business had always been established, improved, regulated by the State, and that the railroad had not lost this character because constructed by individual enterprise, aggregated into a corporation. We are not prepared to say that the latter view of it is not the true one especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition." [7]

§ 46. Irrigation canals as an example.

Whenever, therefore, the propriety of the grant of State aid to a corporation is in question, the inquiry always is whether the business conducted by the grantee is affected by a public interest. It would be an obviously absurd method of solving the problem to say that the business is made public by the grant of State aid, and therefore the grant of State aid is justifiable as the business has been proved to be public. The courts therefore wish to know from some external tests whether the business is public in character. Thus, in the case of Fallbrook Irrigation District v. Bradley,[8] it was claimed that a statute by which

[6] Gray, J., in Cole v. La Grange, 113 U. S. 1, 6, 28 L. Ed. 896 (1885).

[7] Miller, J., in Loan Association v. Topeka, 20 Wall. (U. S.) 655, 658, 22 L. Ed. 455, 460 (1874).

[8] 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56 (1896).

taxation was imposed for irrigation purposes was unconstitutional. In the course of the opinion of the court Mr. Justice Peckham said:[9] "The use must be regarded as a public use or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect. . . . The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. A private company or corporation without the power to acquire the land *in invitum* would be of no real benefit. . . . If that power could be conferred upon them it could only be upon the ground that the property they took was to be taken for a public purpose."[10]

[9] At page 160.

[10] In the following cases, among others, the public character of the irrigation systems is recognized:

United States—Stanislaus Co. v. San Joaquin C. & I. Co., 192 U. S. 201, 48 Law Ed. 406, 24 Sup. Ct. 24 (1903); San Diego L. & I. Co. v. National City, 174 U. S. 739, 43 Law Ed. 1154, 19 Sup. Ct. 804 (1899); Atlantic Trust Co. v. Goodbridge Canal & Irr. Co., 79 Fed. 39 (1897).

Arizona.—Slosser v. Salt River Valley Co., 7 Ariz. 376, 65 Pac. 332, B. & W. 37 (1901).

California—Price v. Riverside Co., 56 Cal. 431 (1880); Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720 (1896).

Colorado—Wheeler v. No. Col. Irr. Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603, B. & W. 301 (1888); Junction Creek, etc., Ditch Co. v. City of Durango, 21 Colo. 194, 40 Pac. 356 (1895); Wright v. Platte Co., 27 Colo. 322, 61 Pac. 603 (1900).

Idaho—Witterding v. Green (Idaho, 1896), 45 Pac. 134 (1896).

Kansas—Western Irr. & Land Co. v. Chapman (Kan. App. 1899), 59 Pac. 1098 (1899).

Nebraska—Paxton Co. v. Farmers' Co., 45 Neb. 884, 64 N. W. 343, 50 Am. St. Rep. 585 (1895).

Oregon—Umatilla Co. v. Barnhardt, 22 Ore. 389, 30 Pac. 37 (1892).

Texas—Mud Creek Irrigation Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078 (1889).

Washington State—Prescott Irrg. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635 (1899).

§ 47. Grist mills as an example.

The grist mills constitute another instance of an enterprise which it is close to the line of constitutionality for the State to aid. There is an excellent decision in the Supreme Court of the United States,[11] in which the tests are discussed by which the public character of a business may be judged. The issue was whether a series of bonds were valid under the State Constitution. These bonds had been made to aid in the construction and completion of a steam custom grist mill within the township. The Constitution empowered the execution of bonds for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water power by donation thereto or taking stock therein, or for other works of public improvement.

Mr. Justice Hunt in delivering the opinion of the court said in part: "The mill was a steam mill. Does such an establishment fall within the description of other works of internal improvement? It would require great nicety of reasoning to give a definition of the expression internal improvement which would show that the means of transportation were more valuable to the people of Kansas than the means of obtaining bread. It would be a poor consolation to the people of this town to give them the power of going in or out of the town upon a railroad, while they were refused the means of grinding their wheat. The statute of Kansas upon the subject of grist mills is based upon the idea, and, indeed, upon the declaration, that all grist mills are public institutions. In c. 65 of the Statute of 1868, p. 573, it is thus enacted: All water, steam or other mills, whose owners or occupiers grind or offer to grind grain for toll or pay are hereby declared public mills. Regulation is then made for the order in which customers shall be attended to, the liability of the miller, the rates of toll. Under our recent

[11] Township of Burlington v. Beasley, 94 U. S. 310, 24 L. Ed. 161 (1876).

decision in Munn v. Illinois, and the other cases upon kindred subjects, it would be competent to the legislature of Kansas, to regulate the toll to be taken at these mills."

It is plain that this is a close case when it comes down to final adjudication. It is true that it is indispensable that the people of Kansas should have the means of obtaining bread, but so is it necessary that they should have the means of getting meat. Purveying to a public need does not make a calling public, for upon that line of reasoning most businesses do that to a degree. It must be, therefore, that it is the conditions surrounding the vending that affect the employment with a public interest. Where there is virtual competition the State has no function to interfere: it is only where there is virtual monopoly that the State may regulate the service. Upon the whole that is the basis upon which this opinion is founded. It holds that it would be competent for the legislature to regulate the toll to be taken by these mills; therefore it argues that the establishment of them is a public purpose, treating these matters as all one legal problem.[12]

TOPIC B.—EFFECT OF LEGAL MONOPOLY CONSIDERED.

§ 48. Grant of an exclusive franchise.

The grant of an exclusive franchise is, as has been seen, a thing which will justify regulating the business of the holder of it as a public business. Most carriers have no such special and exclusive franchise, and they are none the less in the public service; and the reason for including carriers in that category and for justifying the legal regulation of their business must be

[12] The following cases, among others, thus in effect hold grist mills to be in public calling: Boston Mill Corp. v. Newman, 12 Pick. 467 (1832); Traver v. Merrick County, 14 Neb. 327, 45 Am. Rep. 111 (1883); Scudder v. Trenton Falls Co., 1 Saxt. Ch. (N. J.) 694, 23 Am. Dec. 756 (1832); Blair v. Cummings County, 111 U. S. 363, 4 Sup. Ct. 449, 28 L. Ed. 45 (1884).

sought elsewhere. But wherever a carrier has such an exclusive franchise (as often happens, for instance, in the case of a railway) he is for that reason subject to legal regulation.

§ 49. Bonded warehouses as an example.

That an exclusive franchise, which constitutes a legal monopoly, puts the person who possesses it in the position of public service, is entirely clear. The leading case upon legal monopoly is Allnutt v. Inglis.[1] The question there was whether the London Dock Company had a right to insist upon an arbitrary hire for receiving wines into its warehouses, or whether they were bound to receive them there for a reasonable reward only. It appeared that by virtue of the Warehousing Act that company alone had the legal privilege of taking goods in bond in the port of London.

Lord Ellenborough said in part: "There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms. Here then the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose."[2]

According to this case special legal privilege has its correlative legal obligation; that is, the acceptance of unusual rights involves a continuous duty to serve all that apply. This solution is in reality the logic of the situation. If by force of his

[1] 12 East, 527, B. & W. 70 (1810).

[2] As to the public character of warehouses in general, see the annotation to § 28, *supra*.

franchise the holder could refuse facilities to all the world, the position of things would be intolerable. The doctrine of this case provides an escape from that situation. It does not deny that the privilege exists to its full extent, but it puts upon the grantee the limitation that he may charge reasonable prices only. It is in this way that in modern times the intolerable condition that special privilege without special duty would create is avoided.

§ 50. Log driving corporations as an example.

Weymouth v. Penobscot Log Driving Company,[3] a case outside the beaten track, shows that the doctrine of public calling will be extended to any case in which the decisive circumstance of legal monopoly is shown. This was an action brought against the log driving company by a lumberman who had hauled his logs to various landings on the west branch of the Penobscot River, where he had notified the company that they were located; he alleged that those in charge of the drive had carelessly left the logs behind so that they did not come to market that year. The company requested the court to instruct the jury that the corporation was not under any legal obligation to drive the logs upon request.

Mr. Justice Danforth held that the instruction was properly refused under the circumstances. "In this case the charter conferred the privilege of driving, not a part, not such a portion as the company might choose, but 'all' the logs to be driven. This right having been accepted by the company, it became a vested and also an exclusive right. It is therefore taken not only from all other corporations, but excludes the owner as well. By its acceptance and exclusion of the owner from the privilege, in justice and in law it assumed an obligation corresponding to, and commensurate with its privilege. It accepted the right to drive *all* the logs, and that acceptance was an undertaking to

[3] 71 Me. 29, B. & W. 27 (1880).

drive them *all*, or to use reasonable skill and diligence to accomplish that object."

Upon the whole this case better than most shows the impossibility of any other decision in cases, like this, of legal monopoly. Formerly the river was open to every one for the purpose of floating his logs to market; now it was closed to every one. A lumberman whom the company refused to serve would therefore have no alternative, since to drag his logs overland to market would not be a commercial possibility. No reasonable system of law would leave without relief a man confronted with such a situation. If any rule in our law is dictated by natural justice, this one would seem to be.[4]

§ 51. Use of the streets.

Carriers and other public-service companies are sometimes granted a use of the public streets; and this right to use the streets has been urged as the reason for holding the user to be subject to regulation by law. But here again the earlier carriers, and indeed most carriers at the present day have no peculiar rights in the streets. The power of regulation must therefore be sought in some other characteristic of the carrier.

§ 52. Street railways as an example.

Of course the most obvious illustration of the grant of the use of the streets to a public service corporation is for the operation of a street railway. But it is because the street railway is a common carrier that it is permissible to give it the use of the streets. Sometimes this is stated rather plainly. Thus in State v. Spokane Street Railway Company,[5] Mr. Justice Reeves

[4] The following cases, among others, hold the log driving companies in public calling: Sands v. Manistee River Imp. Co., 123 U. S. 288, 31 L. Ed. 149 (1887); Penobscot Log D. Co. v. West Branch L. D. Co., 99 Me. 452, 59 Atl. 593 (1905); Mann v. White R. L. Log Driving Co., 46 Mich. 38, 8 N. W. 550, 41 Am. Rep. 141 (1881).

[5] 19 Wash. 518, 53 Pac. 719, 720 (1898).

in establishing the public character of the business said: "Its franchise was granted to appellant by the State, not for its own profit alone or that of its stockholders, but in a large measure for the public benefit. Peculiar privileges were conferred upon it in consideration that it would provide facilities for communication and for intercourse for the public. It is a common carrier. It was granted the power of eminent domain, a part of the sovereignty of the State, and, with the consent of the municipalities it may lay its tracks over the public streets and highways." [6]

§ 53. Electrical subways as an example.

A late method of permitting the use of the streets by electrical companies is by authorizing the construction of a general duct large enough to hold the wires of various companies. The electrical subway company chartered for such a purpose may or may not be given an exclusive privilege against the construction of other similar enterprises. For the purpose of accommodation of various interests full power of control is usually reserved by the governmental authority which grants the rights. Often, as in the case of New York, this is exercised by a special board. What are the mutual rights and duties between an electric light company and an electrical subway company? It ought not be difficult to determine. Brush Electric Illumi-

[6] The following cases, among many others, involve the proposition that street railways are public business: Milwaukee El. Ry. v. Milwaukee, 87 Fed. 577 (1898); Barrett v. Market St. Ry., 81 Cal. 296, 22 Pac. 859, 15 Am. St. Rep. 61, B. & W. 297 (1889); Chicago & M. El. Ry. v. Ch. & N. W. Ry., 211 Ill. 352, 71 N. E. 1017 (1904); Dean v Chicago G. Ry., 64 Ill. App. 165 (1896); Levi v. Lynn & B. Ry., 11 Allen (Mass.), 300, 87 Am. Dec. 713, B. & W. 11 (1865); Parker v. Metropolitan Ry., 109 Mass. 506; Com. v. Interstate Consolidated Ry., 187 Mass. 436 (1905); Bay v. Omaha St. Ry., 44 Neb. 167, 62 N. W. 447, 48 Am. St. Ry. 717 (1895); Putnam v. Broadway & Sev. Ave. Ry., 55 N. Y. 108, 73 N. E. 580, 14 Am. Rep. 190 (1873).

nating Company v. Consolidated Telegraph and Electrical Subway Company,[7] one of the few cases in the books as yet, is hardly satisfactory in its treatment of the general question.

In refusing an injunction asked by the plaintiff company in that case, to prevent the defendant company from removing the wires of the plaintiff, although the plaintiff professed itself willing to pay a reasonable price, Justice Ingraham said: "The plaintiff claims that the defendant is a *quasi* public corporation, and has only such rights as are given to it by charter, and, as it is nowhere expressly given the right to withdraw the plaintiff's wires from its ducts, when they are once there it must allow them to remain there forever; and the only remedy that the defendant has against the plaintiff, or any one using its ducts, is an action at law for the recovery of the rent reserved. But the statutes and contracts in question conferred upon defendant no remedy in case of the refusal of a person using its subways to pay the rate fixed, and I can see no reason why it should not have the same rights that any other person would have under similar circumstances. It seems to me, however, that this position arises out of a misconception of the defendant's real position. The defendant is not a common carrier, nor has it received from the State a franchise such as is conferred upon a ferry company or a turnpike road. Defendant, it is true, obtained permission from the public authorities to build these subways in the public streets, and it has bound itself by contract to furnish to such corporations or individuals as have authority to use the public streets for electrical purposes the use of its subways, but such obligation rests entirely upon its contract under which it received its authority to build its subways. Irrespective of that contract, and section 7 of the Acts of 1887, the plaintiff would have no right, against the will of the defendant, to use its subways, nor would the public authorities, nor the courts, have power to compel the defendant to give

[7] 15 N. Y. Supp. 811, B. & W. Cases, 30 (1891).

any rights to the plaintiff. Whatever right, therefore, the plaintiff acquired, it is under the contract under which the defendant had authority to build the subways, and the statutes under which such contract was made, and there can be nothing found in these statutes or contract that would justify the claim of the plaintiff. On the contrary, the utmost care is taken to provide for the payment of compensation to the defendant for the use of the subways, and defendant is expressly prevented from giving any one the right to use them, except upon the payment of the rate fixed; and to say that a corporation getting permission to use the subways upon an agreement to pay the rate fixed for its use, under the provisions of the statute, could, by simply refusing to pay, defeat the express provisions of the contract by using the subway without paying for it the rate fixed or paying a less rate, would subvert the whole scheme under which the subways have been built." [8]

§ 54. General conclusions relative to special legal privileges.

It is submitted therefore, without going into more detail about the matter, that under our constitutional system no special privileges can be granted except for a public purpose. Unless there is public interest apparent the grant is void. In the case of the public service companies which have been brought forward for examination thus far in this discussion, a characteristic fact has been that the corporation in question enjoyed some privilege or other from the State. It is quite true that eminent domain, or at least use of the streets, may be found in many of the examples cited; while aid out of taxation may be fastened upon in certain instances, and even actual operation by the State has been known. The question thus arises whether the establishment of public employment depends upon public privileges; or whether the conditions of virtual monopoly, how-

[8] Much to the same effect is West Side El. Co. v. Consolidated Tel. & El. Co., 87 N. Y. App. Div. 550, 84 N. Y. Supp. 1052 (1903).

ever caused, may give rise to public calling if the State has had no hand in the establishment of the situation.

All these considerations are most suggestive; indeed, one is led by them to an entire reversion of the common statement of the relation between the existence of public privileges and the establishment of public employment. It is common to argue that because a certain business has had a certain privilege granted to it, the consequence of that privilege is that the business is put by the courts in the class of public callings. But the real truth of the matter seems to be in the opposite statement, that no business can be granted a privilege under our constitutional system unless it is public in character. This is because the conditions which permit competition or produce monopoly are altogether external matters of fact with which, when accomplished, the law must deal. The difference between public calling and private calling is thus inherent in the nature of things.

TOPIC C.—VIRTUAL MONOPOLY AS A GROUND OF PUBLIC POSITION OF THE CARRIER.

§ 55. Virtual monopoly the true ground for regulating public callings.

Upon the whole, the conditions surrounding the acknowledged public services suggest this working hypothesis, that in the private calling the situation is that of actual competition, while in the public calling the situation is that of virtual monopoly. The division indicated is a proper one; where competition prevails it regulates the conduct of business by its own processes, but monopoly requires the intervention of the law of the land in all cases where the business is of public importance. Wherever virtual monopoly is established the situation demands this law; that all who apply shall be served, with adequate facilities, for reasonable compensation and without discrimination. Otherwise in crucial instances of oppression, inconvenience, extor-

tion and injustice there will be no legal remedies for these industrial wrongs. This is as true where the origin of this condition of monopoly is in natural limitations as where the establishment of it is by fiat of the State. Natural monopoly should be dealt with upon the same basis as legal monopoly; and indeed is so treated by the inclusion of both within the law of public employments. How far, then, it can be said that the common carrier has a virtual monopoly of a business of public importance must now be considered.

§ 56. Monopoly due to character of business.

The monopoly which the medieval carrier enjoyed was due to the character of the business. Owing to the local nature of the medieval economy, the amount of traffic was small; yet one who pursued the calling of common carriage must in order to do so effectually establish a certain regular course of business, and must be prepared to take care of traffic when it presented itself. In the nature of things, therefore, one could expect but a single carrier in any ordinary village or borough. This made competition at any place almost impossible. The extreme difficulty of changing one's occupation in the middle ages contributed to prevent competition. The medieval carrier, therefore, like the innkeeper, surgeon and smith, did enjoy a virtual monopoly.

From the point of view of the shipper also the possibility of competition in the business of carriage is limited. If one grocer refuses to sell him goods he can without great inconvenience go to another. For the carriage of his goods, however, he is ordinarily limited both in time and in place. His goods must be carried from the place in which they are; he cannot treat with another carrier ten miles away. His goods must usually be carried immediately; he cannot wait for a possible carrier to appear in the future. He is at the mercy of the carrier who is on the spot. Even if the monopoly that results is temporary

in its nature, it is none the less real, and the law must step in or there will often be grave oppression.

§ 57. Water works as an example.

A modern example of an employment which is public because it enjoys a virtual monopoly is that of maintaining water works. One of the earliest needs of a community is a supply of water for domestic uses; and it has been always obvious that this is a public utility in a true sense of that term. Accordingly it was conceded from the first that the situation demanded a coercive law; but the extent to which that law took the disposition of the business out of the discretion of the corporations which provided the supply was not appreciated. Haugen v. Albina Water Company[1] is a late illustration. The defendant company laid a main through Tillamook street upon which the applicant lived, but the defendant from the first refused to supply water to persons living between the east line of the township and Fourteenth street, within which limits the plaintiff resided.

Mr. Justice Lord said in part: "It must be conceded that the defendant is engaged in a business of a public and not of a private nature, like that of ordinary corporations engaged in the manufacture of articles for sale, and that the right to dig up the streets and place therein pipes or mains for the purpose of conducting water for the supply of the city and its inhabitants, according to the express purpose of its incorporation and the business in which it is engaged, is a franchise, the exercise of which could only be granted by the State, or the municipality acting under legislative authority. In such case, how can the defendant, upon the tender of the proper compensation, refuse to supply water without distinction to one and all whose property abuts upon the street in which its pipes are laid? If the supplying of a city or town with water is not a public purpose,

[1] 21 Oregon, 411, 28 Pac. 244, 14 L. R. A. 424, B. & W. 34 (1891).

it is difficult to conceive of any enterprise intrusted to a private corporation that could be classed under that head."

Various elements combine to make the business of supplying water to a community a public calling. Perhaps the chief of these is the natural limitation of the sources which makes the interposition of the State in aid of the enterprise necessary. The method of distribution through pipes requires the permission of the local authorities in order to lay the pipes in the public streets. All this makes competition with the established company improbable, if, indeed, it does not make it impossible. At all events, monopoly in this service is so founded in the nature of things that competition there is all but unknown.[2]

[2] The following cases, among many others, hold water companies to be in public calling:

United States—Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. 48 (1884); New Orleans Water Works v. Rivers, 115 U. S. 674, 29 L. Ed. 525, 6 Sup. Ct. 273 (1885); Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. 718 (1897); Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 46 L. Ed. 1132, 22 Sup. Ct. 820 (1902); San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903); Tampa Water Works Co. v. Tampa, 199 U. S. 241 (1905); National Water W. Co. v. Kansas City, 62 Fed. 853, 10 C. C. A. 653, 27 U. S. App. 165 (1894); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903); Palatka Water Works v. Palatka, 127 Fed. 161 (1903).

Alabama—Smith v. Water Works, 104 Ala. 315, 16 So. 123 (1893); Mobile v. Bienville Water Supply Co., 130 Ala. 379, 30 So. 445, B. & W. 417 (1900).

California—Spring Valley W. W. v. San Francisco, 82 Cal. 286, 16 Am. St. Rep. 116 (1890); San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 663 (1897).

Florida—Tampa Water Works Co. (Fla.), 34 So. 631 (1903).

Illinois—Wagner v. Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519 (1893); Rogers Park Water Co. v. Fergus, 178 Ill. 571, 53 N. E. 363 (1899).

Iowa—Cedar Rapids W. Co. v. Cedar Rapids, 117 Iowa, 250, 91 N. W. 1081 (1902).

Kansas—Shiras v. Ewing, 48 Kan. 170, 29 Pac. 320 (1892).

Kentucky—Franke v. Paducah Water Supply Co., 88 Ky. 467, 11 S. W. 432, 718 (1892).

§ 58. Natural gas as an example.

The conditions surrounding the supply of natural gas present natural monopoly in a most extreme form. It is very common that the fields where the gas is found are at a considerable distance from the city which consumes it. It is then obvious that no private person can get at a supply for himself outside of the established company. These conditions made the inclusion of this service within the class of public employments certain. It is not surprising that we should find a case against a natural gas company applying the doctrines of the law of public calling in the extreme form. This case is, State *ex relatione* Wood v. Consumers Gas Trust Company,[3] the relator applied for gas which was refused upon the ground that all the gas it could pro-

Maine—Rockland Water Co. v. Adams, 84 Me. 472, 24 Atl. 840, 30 Am. St. Rep. 368 (1892); Kennebec Water District v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

Massachusetts—Lumbard v. Stearns, 4 Cush. 60 (1849); Burnett v. Com., 169 Mass. 417, 48 N. E. 758 (1897); Turner v. Revere Water Co., 171 Mass. 329, 56 N. E. 634, 68 Am. St. Rep. 432, 40 L. R. A. 657 (1898).

Missouri—McDaniel v. Springfield Water Works, 48 Mo. App. 273 (1892).

Montana—State v. Butte City Water Co., 18 Mont. 199, 44 Pac. 966, 56 Am. St. Rep. 574 (1896).

Nebraska—American Water Works v. State, 46 Neb. 194, 64 N. W. 711, 50 Am. St. Rep. 610, 30 L. R. A. 44 (1895).

New Jersey—Olmstead v. Morris Aqueduct, 47 N. J. L. 311 (1885).

New York—Silkman v. Water Comm'rs, 152 N. Y. 327, 46 N. E. 612, B. & W. 363 (1898).

North Carolina—Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240, B. & W. 403 (1898).

Oregon—Haugen v. Albina Light Co., 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424, B. & W. Cases, 34 (1891).

Pennsylvania—Brymer v. Butler Water Co., 179 Pa. St. 231, 36 A. 249, 36 L. R. A. 260, B. & W. Cases, 330 (1897).

Tennessee—Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Ry. 1841, B. & W. 468 (1897).

Texas—City Water Co. v. State, 33 S. W. Rep. 259 (1895).

England—Ward v. Folkestone Water Works Co., 24 Q. B. Div. 334 (1890).

[3] 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245, B. & W. 66 (1901).

vide was needed for its present customers, and the supply could not be increased even by sinking new wells.

The court held this excuse no justification. Mr. Justice Hadley, speaking for it, said in part: "The legal effect of the answer is that the relatrix shall have no gas because her neighbors, in common right, have none to spare. There can be no such thing as priority, or superiority, of right among those who possess the right in common. That the beneficial agency shall fall short of expectation can make no difference in the right to participate in it on equal terms. So if appellee has found it impossible to procure enough gas fully to supply all, this is no sufficient reason for permitting it to say that it will deliver all it has to one class to the exclusion of another in like situation. . . . The principle here announced is not new. It is as old as the common law itself. It has arisen in a multitude of cases affecting railroad, navigation, telegraph, telephone, water, gas, and other like companies, and has been many times discussed and decided by the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike, who are like situated, and not discriminate in favor of, nor against any." [4]

§ 59. Gas works as an example.

When the first works were constructed to furnish gas through mains laid in the public streets to various householders in the community at large, new conditions in the supply of illumination were created. Before that time illuminants had been commodities, bought and sold in packages, purchasable at vari-

[4] Citing Cent. L. J. 278; Haugen v. Albina, etc., Co., 21 Ore. 411, B. & W. Cases, 34; Olmsted v. Proprietors, etc., 47 N. J. L. 311; Stern v. Wilkesbarre Gas Co., 2 Kulp. 499; Chicago, etc., Co. v. People, 56 Ill. 365; 8 Am. Rep. 690; Nebraska Tel. Co. v. State, 55 Neb. 627, 634; Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63.

ous shops scattered over every city. The keepers of these shops had never been compelled to sell to all that required of them; why then, it was asked, must gas companies be compelled to do so? At first such doubts had some currency with the courts, but at the present time there is a general agreement that mandamus should issue to compel a recalcitrant company to supply an aggrieved applicant.

One of the earlier instances of this rule in the United States is to be found in Shepard v. Milwaukee Gas Light Company.[5] The plaintiff complained of the refusal of the established gas works to supply him. The defendant claimed that under the circumstances of the case it was not bound to serve the plaintiff. Mr. Justice Smith held that the gas company was bound to sell its gas to every citizen of Milwaukee upon compliance with such regulations only as the company might rightfully impose. His argument was this: "It is sufficient for the purposes of this case to know that the company had the exclusive right to manufacture and sell gas, and that hence the only means of supply available to citizens was through the agency of the company. Corporations of this kind are not like trading or manufacturing corporations whose productions may be transported from market to market throughout the world. Its manufacture depends upon the consumption of the immediate neighborhood for its profit and success, and upon no other place. From the nature of the article, the objects of the company, their relations to the community, and from all the considerations before mentioned, it is to me apparent that the company is not at all analogous to an ordinary manufacturing or trading corporation."

What, after all, is that element in the situation which differentiates the vending of candles from the purveying of gas? Is it not this,—that the box of candles may be sent from any factory into any market, a condition which preserves virtual competition in the sale of candles; while a thousand feet of gas can

[5] 6 Wis. 539, 70 Am. Dec. 479 (1858).

only be got by the consumer from the local gas company, a situation which presents an inevitable monopoly in the supplying of gas. The market is thus limited by the nature of the product. It is in that sense that the monopoly of the local company is natural, and it is for that reason that it is permanent. Experience proves that seldom in any community will competitive conditions prevail in the supply of gas, and never are these conditions lasting. This consideration must be at the basis of the universal holding at the present day that the business of gas making is one of the public services.[6]

[6] The following decisions hold the gas companies to be in public calling:

United States—Gibbs v. Consolidated Gas Co., 130 U. S. 396, 32 L. Ed. 979, 9 Sup. Ct. 553 (1889); Memphis Gas L. Co. v. New Memphis, 72 Fed. 952 (1896).

California—Smith v. Capital Gas Co., 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769 (1901).

Illinois—Chicago Gas Light Co. v. People's Gas Light Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124 (1887).

Indiana—Coy v. Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535 (1897); Portland Nat. Gas Co. v. State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639, B. & W. 41 (1893); Rushville v. Rushville Nat. Gas. Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321 (1892).

Kansas—*In re* Pryor, 55 Kan. 724, 41 Pac. 958, 49 Am. St. Rep. 280, 29 L. R. A. 398 (1895).

Kentucky—Louisville Gas Co. v. Dulaney, 100 Ky. 405, 38 S. W. 703, 36 L. R. A. 125, B. & W. 306 (1897); Owensboro Gas Light Co. v. Hildebrand, 42 S. W. Rep. 351 (1897).

Maine—Brunswick Gaslight Co. v. United Gas, etc., Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385 (1893).

Maryland—Gas Light Co. of Baltimore v. Calliday, 25 Md. 1 (1866).

Michigan—Williams v. Mut. Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266, B. & W. 298 (1884).

Montana—St. Louis v. St. Louis Gas Light Co., 70 Mo. 69 (1879).

New York—People v. Manhattan Gas Co., 45 Barb. (N. Y.) 136 (1865); Bath Gas Light Co. v. Claffy, 74 Hun (N. Y.), 638, 26 N. Y. Supp. 287 (1893); Bloomfield, etc., Natural Gas Light Co. v. Richardson, 63 Barb. (N. Y.) 437 (1872); Schmeer v. Gas Light Co., 147 N. Y. 529, 42 N. E. 202 (1895); Morey v. Metropolitan Gas Light Co., 38 N. Y. Sup. Ct. 185 (1874); New York Cent. R. R. Co. v. Met. Gas Light Co., 5 Hun (N. Y.), 201 (1875).

§ 60. Electric plants as an example.

In the present generation a new method of illumination by electricity was devised which involved distribution from a central plant by a system of wires radiating through the localities served—a very expensive plant to install. The essential features of the electric business are so like the main conditions in the gas business, it was obvious that the same law of public service was to be enforced in this instance. Indeed, it is most significant that no electric light company has ever squarely denied that there rested upon it the primary obligation to serve all.

All this is most significant; for it shows that the law of public service has now such general acceptation that in any new instance that is obvious it will be applied by the courts without hesitation. The latest case is Snell v. Clinton Electric Light Company,[7] where the company refused to furnish electric light to the applicant until he paid the cost of the transformer. The real reason for the refusal was a business policy of the company to increase their operations by charging applicants for transformers unless the wiring of the house was done by the company itself. In the present case the wiring was done by outside parties, but the jury found that the residence was properly wired.

Ohio—Lanesville v. Gas Light Co., 47 Ohio St. 1, 23 N. E. 55 (1889).

Pennsylvania—Pittsburg's Appeal, 123 Pa. St. 374, 25 Am. & Eng. Corp. Cases, 364 (1889); Hoehle v. Allegheny Heating Co., 5 Pa. Supr. Ct. 21 (1897); Bailey v. Fayette Gas Co., 193 Pa. St. 175, 44 Atl. 251, B. & W. 412 (1899).

Washington—Faconia Hotel Co. v. Faconia Gas Light Co., 3 Wash. 316, 28 Pac. 516, 14 L. R. A. 669 (1891).

Wisconsin—Shepard v. Milwaukee Gas Co., 6 Wis. 539, 70 Am. Dec. 479 (1858).

The earlier decisions to the contrary no longer have any force but are interesting historically: McCune v. Norwich Gas Co., 30 Conn. 521, 79 Am. Dec. 278 (1864); Commonwealth v. Lowell Gas Co., 12 Allen, 75 (1866); Paterson Gas Co. v. Brady, 27 N. J. Law (3 Dutch), 245, 72 Am. Dec. 360 (1858).

[7] 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284, B. & W. 311 (1902).

In holding for the consumer Mr. Justice Carter stated the fundamental propositions involved in this way: "There is no statute regulating the manner under which electric light companies shall do business in this State. They are therefore subject only to the common law, and such regulations as may be imposed by the municipality which grants them privileges. Appellee, being organized to do a business affected with a public interest, must treat all customers fairly and without unjust discrimination. Both reason and authority deny to a corporation clothed with such rights and powers and bearing such a relation to the public the power to arbitrarily fix the price at which it will furnish light to those who desire to use it. The company was bound to serve all its patrons alike, it could impose on the plaintiff in error no greater charge than it exacted of others." It is noticeable that in this opinion only one of the cases cited is that of an electric light company; the other examples cited involve gas and water, telephone and telegraph, proof positive that in the mind of the court these all fall within one department of the law.

In this business of electric lighting one element in the conditions which produce monopoly is prominent,—the absence of the substitute, that is, the cost to the consumer of shifting for himself if he is refused. No electricity at all can be produced by the smaller consumers without the installation of apparatus of great cost, operated thereafter at large expense. Moreover, this is a business where when the units are smaller the cost of production is greater by a surprising ratio, so that in ordinary conditions none of the larger consumers would go to supplying them unless the rates of the company were unreasonable. This state of affairs would put the patron at the mercy of the company, unless the law interposed and compelled the rendition of service upon a reasonable basis." [8]

[8] The following decisions, among others, hold the electric companies to be in public calling:

TOPIC D.—MONOPOLY OF THE ESTABLISHED PLANT.

§ 61. Monopoly due to established plant.

Medieval conditions have passed away, and the causes which contributed then to the carrier's monopoly have ceased to operate; but others of still greater force have taken their place. In the case of the important carriers to-day—the railway, the street railway, the express company, the steamship line—the enormous amount of money invested discourages and prevents competition. The amount of money necessary to be raised and put at risk in order to enter upon the business of carriage is too great to subject it to competition with an already established and successful enterprise. Even when an investment is made, a competing line of railroad built or a new express company organized, it soon becomes apparent that competition is ruinous to one if not to both of the enterprises, and consolidation results, bringing monopoly again.

The magnitude of the investment required is not the only thing that deters competition. The fact that a long-established railroad or express company has a valuable plant which has been built and improved from year to year makes it almost impossible, by the expenditure of any reasonable amount of money

United States—Capital City Light Co. v. Tallahassee, 186 U. S. 401, 46 L. Ed. 1219.

Illinois—Snell v. Clinton Electric Light Co., 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284, B. & W. 311 (1902), (reversing 95 Ill. App. 552).

Massachusetts—Opinion of Justices, 150 Mass. 592, 24 N. E. 1084 (1890).

New York—Andrews v. Electric Light Co., 24 N. Y. Misc. Rep. 671, 53 N. Y. Supp. 810 (1898); Gould v. Edison Electric Co., 29 N. Y. Misc. 241, 60 N. Y. Supp. 559, B. & W. 308 (1899); Moore v. Champlain Electric Co., 88 N. Y. App. Div. 289, 85 N. Y. Supp. 37 (1903).

Ohio—Cincinnati R. R. v. Bowling Green, 57 Ohio St. 336, 49 N. E. 129, 41 L. R. A. 422, B. & W. 44 (1897).

Pennsylvania—Mercur v. Media Electric Light Co., 19 Pa. Supr. Ct. 519 (1902).

England—Metropolitan Electric Co. v. Ginder (1901), 2 Ch. Div. 799.

to provide a new enterprise with a plant equally effective. Still more, the establishment of a prosperous business and the building up of a good will contribute greatly to make any possible competition ineffective. Not only is the good-will of an established business a valuable asset which the new enterprise cannot duplicate; a great and long established business can be much more cheaply and economically conducted than any new business, however great its capital and able its management. All these causes contribute to the virtual monopoly of the carrier of to-day.

§ 62. Telegraph service as an example.

Ever since the introduction of the telegraph the situation has required special law. The applicant is confronted by a company whose lines spread over great areas of the country, so that unless he is served by the company in question he usually has no method to shift for himself. Generally there is no substitute.

The invention of the telegraph came at a time, about the middle of the nineteenth century, when the public callings that were recognized by the courts were so few that, naturally, it was not realized that such a department of the law existed. But the need of dealing with this new agency upon the basis of requiring public service was from the first so pressing that with some violence to the facts the public telegraph was held a common carrier. In truth the only similarity between these businesses is that in both the obligation to serve all that apply is a necessary condition, that is, both callings are public in their nature.

In one case at least the public character of the telegraph system is rested finally upon the dependence of the public upon the established system. In Ayer v. Western Union Telegraph Company,[1] in declaring telegraph companies to be public call-

[1] 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353 (1887).

ings, in holding void therefore a stipulation made by them that they should not be liable for negligence, Mr. Justice Emery said: "Telegraph companies are *quasi* public servants. They receive from the public valuable franchises. They owe the public care and diligence. Their business intimately concerns the public. Many and various interests are practically dependent upon it. Nearly all interests may be affected by it." [2]

[2] The following cases, among many others, involve the holding that the telegraph is a public calling:

United States—Primrose v. Western Union Telegraph Co., 154 U. S. 1, 38 L. Ed. 883, 14 Sup. Ct. 1098, B. & W. 525 (1894); Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92, 45 L. Ed. 765 (1901); Western Union Telegraph Co. v. Wyatt, 98 Fed. 335 (1899); United States v. Northern Pac. R. Co. et al., 120 Fed. 546 (1903).

Alabama—Western Union Telegraph Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148 (1890).

Florida—Western Union Telegraph Co. v. Hyer, 22 Fla. 637, 1 So. 129, 1 Am. St. Rep. 222 (1886).

Illinois—People v. Western Union Telegraph Co., 166 Ill. 15, 46 N. E. 731 (1897).

Indiana—Telegraph Co. v. Harding, 103 Ind. 505, 3 N. E. 172 (1885).

Kentucky—Camp v. Western Union Telegraph Co., 1 Met. (Ky.) 164, 71 Am. Dec. 461 (1858).

Maine—Ayer v. Western Union Telegraph Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 358 (1887).

Maryland—U. S. Telegraph Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519 (1868).

Mississippi—Western Union Telegraph Co. v. Liddell, 68 Miss. 1, 8 So. 510 (1891); Western Union Telegraph Co. v. Mississippi Commission, 74 Miss. 80, 21 So. 15 (1896).

Missouri—Reed v. Western Union Telegraph Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492 (1896).

Nebraska—Kempt v. Western Union Telegraph Co., 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363 (1890); Western Union Telegraph Co. v. Call Publishing Co., 44 Neb. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622 (1895).

North Carolina—Railroad Commissioners v. Western Union Telegraph Co., 113 N. C. 213, 18 S. E. 389 (1893).

Pennsylvania—Western Union Telegraph Co. v. Stevenson, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515 (1889).

South Dakota—Kirby v. Western Union Telegraph Co., 7 So. Dak. 623, 65 N. W. 37, 30 L. R. A. 612 (1895).

§ 63. Telephone service as an example.

An excellent example of a public duty based largely on the existence of a monopoly by reason of a great established plant is that of the telephone company. In the case of the telephone duplicate services must be provided to make competition possible; for it is not enough to get new takers into a new system, the old ones must be gotten in to satisfy the new ones. From an economic point of view the duplication of plant that is necessary to make competition possible in these public utilities is sheer waste, without compensating advantages. From a business point of view this fact is a most effective deterrent. When one of these public services is established in a neighborhood, it is infrequent that men will be found to invest their money in the construction of another plant. The risk of loss in such a case is too great, for since the market for both old and new is limited to the locality, the struggle must of necessity be so desperate that neither can expect to escape serious injury. Moreover, since most of such public works are permanent in their construction, if the venture fails of success an attempt to remove them would result in almost total loss.

The best discussion of the nature of public calling is to be found in the cases concerning the telephone. These again are most of them common law decisions, so that they disclose the essential tests by which public calling is established. One of the best of these cases, because of its full working out of the problems, is State v. Nebraska Telephone Company.[3] In that case the company refused to comply with the relator's request for a telephone, giving various excuses, all of which the court held invalid, and thereupon issued a mandamus ordering the telephone company to fulfill its public duty to the applicant.

Texas—Western Union Telegraph Co. v. Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847, B. & W. 479 (1894).

Utah—Brown v. Western Union Telegraph Co., 6 Utah, 236, 21 Pac. 988, B. & W. 475 (1889).

[3] 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404, B. & W. 142 (1885).

Upon the general issue Mr. Justice Reese said: "While it is true, as claimed by respondent, that it has been organized under the general corporation laws of the State, and in some matters has no higher or greater right than an ordinary corporation, yet it is also true that it has assumed to act in a capacity which is to a great extent public, and has, in the large territory covered by it, undertaken to satisfy a public want or necessity. This public demand can only be supplied by complying with the necessity which has sprung into existence by the introduction of the instrument known as the telephone, and which new demand or necessity in commerce the respondent proposes satisfying. It is also true that the respondent is not possessed of any special privileges under the statutes of the State, and that it is not under quite so heavy obligations, legally, to the public as it would be, had it been favored in that way, but we fail to see just how that fact relieves it. While there is no law giving it a monopoly of the business in the territory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by the 'plant' of respondent, from the very nature and character of its business gives it a monopoly of the business which it transacts. No two companies will try to cover this same territory. The demands of the commerce of the present day makes the telephone a necessity. All the people upon complying with the reasonable rules and demands of the owners of the commodity—patented as it is—should have the benefits of this new commerce. The wires of respondent pass the office of the relator. Its posts are planted in the street in front of his door. In the very nature of things no other wires or posts will be placed there while those of respondent remain. The relator never can be supplied with this new element of commerce so necessary in the prosecution of all kinds of business, unless supplied by the respondent."[4]

[4] The following decisions, among many others, hold the telephone companies to be in public calling:

§ 64. Sewerage system as an example.

The laying out of a sewerage system involves a great first cost, so great that as a commercial matter the established system would never be duplicated by a competing system even if one were authorized. Cases establishing the public duty of an established sewerage system to serve all that apply are few, since the works are generally constructed by the local governmental authorities, who seldom refuse to give service upon fair terms. There is such a case recently decided, however, Mobile

United States—Chesapeake Telephone Co. v. Manning, 186 U. S. 238, 46 L. Ed. 1144, 22 Sup. Ct. 881 (1901); State v. Bell Telephone Co., 23 Fed. 539 (1885); Delaware v. Delaware Telephone Co., 57 Fed. 633, s. c. 50 Fed. 677 (1891).

Indiana—Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201 (1885); Cen. U. Telephone Co. v. Falley, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114 (1888); Central Union Telephone Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035 (1896).

Kentucky—Louisville Transfer Co. v. American District Telegraph Co., 1 Ky. L. J. 144; Owensboro Harrison Telephone Co. v. Wisdom, 62 S. W. 529, 23 Ky. Law Rep. 97 (1901).

Maryland—Chesapeake Telephone Co. v. Baltimore Telephone Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167, B. & W. 183.

Michigan—Mahan v. Michigan Telephone Co., 132 Mich. 242, 93 N. W. 629 (1903).

Missouri—Louis v. Bell Telephone Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370 (1888); State v. Knitoch Telephone Co., 93 Mo. App. 349, 67 S. W. 684 (1902).

Nebraska—State v. Neb. Telephone Co., 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404, B. & W. 142 (1885).

New York—People v. Hudson R. Telephone Co., 19 Abb. N. C. (N. Y.) 466 (1887); Matter of Baldwinsville Telephone Co., 24 N. Y. Misc. 221, 53 N. Y. Supp. 574 (1898).

Ohio—State v. Bell Telephone Co., 36 Ohio St. 296, 38 Am. Rep. 583 (1880).

South Carolina—State v. Citizens' Telephone Co., 61 So. Car. 83, 39 S E. 257, 85 Am. St. Rep. 870 (1901).

Pennsylvania—Bell Telephone Co. v. Com., 3 Atl. 825 (1886).

Rhode Island—Gardner v. Providence Telephone Co., 23 R. I. 312, 50 Atl. 1014, 55 L. R. A. 115, B. & W. 202 (1901).

Vermont—Commercial Union Telegraph Co. v. New Eng. Telephone Co., 61 Vt. 2411, 17 Atl. 1071, 15 Am. St. Rep. 893 (1888).

v. Bienville Water Supply Company.[5] The bill in that case averred an outrageous discrimination practiced by the city, which was conducting both a water supply and a sewerage service, in charging those who had sewerage service alone from the city and those who had both sewerage service and water supply the same. Upon this showing Mr. Justice Haralson spoke sharply: "From the facts of the case, as above recited, if true —as they must be taken on demurrer,—it distinctly appears that the city, while it has the authority to do so, has never, by ordinance, fixed any charge or rate for the use of its sewers, and, indeed, is making no charge to its own customers for the use of the same; that it charges any one using its water alone as much as it charges another for the use of both water and sewer; and against those who use the complainant's water, it charges for sewer service alone as much as it charges its own customers for both water and sewerage,—thus making its sewers free to those who use its water, while it imposes on complainant's customers a discriminating and onerous charge for the use of its sewers,—as much, as is alleged, as it charges for its own water and sewerage in addition. Whether intended by the city to so operate or not, one can scarcely conceive of a more effective scheme to deprive the complainant of its customers than the one alleged in the bill. If complainant has to furnish its customers with water, and they are required by the city to pay for sewerage the same price it charges its own customers for its water and sewerage, it follows the complainant would have to furnish water practically free or abandon the business; for it would be unreasonable to suppose that any one would use the complainant's water and bear the additional expense imposed for so doing. These sewers of the city are for the public at large, and every one should be permitted to use them without any discrimination in charges against him. The franchise to

[5] 130 Ala. 379, 30 So. 445 (1901).

construct sewers being in the nature of a public use, the duty is on the city to supply sewerage rates to all impartially on reasonable terms. As is said by Mr. Bates: 'All persons are entitled to have the same service on equal terms and on uniform rates.' In addition it is averred, as seen, that citizens are notified by the city that they cannot use its sewers unless they subscribe for the city water, and customers of complainant, desiring to return to it, are forbidden by the city from disconnecting from its pipes and connecting with complainant's, a threat the city has the physical power to enforce." [6]

§ 65. Docks as an example.

The established docks are similar to these other instances recently under discussion. Vessels calling at a port are practically forced to use the public docks that are open to it. There will necessarily be comparatively few docks since the positions upon deep water and near to the commercial centres are few. There will be oppression resulting from this situation unless the law of public service is applied.

Barrington v. Commercial Dock Company[7] bears out this contention. The appellant was the owner of a wharf situated upon navigable water in the city of Tacoma, not located, however, upon any highway. The respondents were owners of the steamer Cricket, a passenger steamer plying between the cities of Tacoma and Seattle; they instituted this action for the purpose of compelling the appellant to permit them to use its wharf as a landing place. Vessels of a similar character in competing business with the steamer Cricket were permitted to use the dock. The only statute gave a right to erect wharves upon navigable waters and to charge wharfage. The appellant therefore contended that the wharf was its private wharf, and that it had

[6] See Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 46 Law Ed. 1132, 22 Sup. Ct. 820, B. & W. Cases, 417 (1902).

[7] 15 Wash. 170, 45 Pac. 748, 33 L. R. A. 116 (1896).

therefore the right to determine for itself with whom it would do business.

Mr. Justice Gordon founded his argument upon these propositions: "When wharves belonging to individuals are legally thrown open to the use of the public, they become affected with a public interest. We think that in determining the character of the appellant's wharf, regard should be had to the use to which it has been devoted rather than its private ownership, and that upon the facts found the position of the appellant cannot be maintained. As well might the proprietor of a stage coach claim the right to discriminate upon the ground that the property employed in his business was private property. The doctrine, if maintained, would tend to promote and further monopolies which it is not the policy of our law to favor." [8]

§ 66. General conclusions as to virtual monopolies.

A review of the instances which have been cited in the course of this discussion will show that this conception of virtual monopoly will cover everything. Nothing narrower will do, as for example the difference sometimes put forward between the

[8] The following cases, among many others, consider docks and wharves as public in character:

United States—West Coast Co. v. Louisville & N. Ry., 121 Fed. 645, 57 C. C. A. 671 (1903).

Florida—Indian River S. S. Co. v. East Coast Transportation Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258 (1891).

Georgia—Robertson v. Wilder, 69 Ga. 340 (1882); Macon D. & S. R. R. Braham v. Ward, 117 Ga. 555, 43 S. E. 1000 (1903); District v. Johnson, 1 Mackey, 51 (1881).

Louisiana—Aiken v. Eagar, 35 La. Ann. 567 (1883).

Minnesota—Vega Steamship Co. v. Consol. Elevator Co., 75 Minn. 308, 77 N. W. 973, 74 Am. St. Rep. 484, 43 L. R. A. 843 (1899).

New York—Buffalo v. Delaware, L. & W. Ry., 39 N. Y. Supp. 4 (1895); Alexandria Bay S. S. Co. v. N. Y. C. & H. R. Ry., 18 N. Y. App. 527, 45 N. Y. Supp. 1091 (1897).

Pennsylvania—Rogers v. Stophel, 32 Pa. St. 111 (1858).

undertaking of a public service in contradistinction to the furnishing of a public supply. Now, it is true that most of the cases are cases of service—the railway and the warehouse, for example; but other of the cases are of supply,—the waterworks and gas works, for instance. Indeed, there is nothing in this distinction, either in economics or in law. It is submitted that any business is made out public calling where there is a virtual monopoly inherent in the nature of things.

The conclusion seems to be forced upon us that virtual monopoly creates the necessity for public regulation and justifies it; and upon this our constitutional law turns. If virtual monopoly is made out as the permanent condition of affairs in a given business, then the law, it seems, will consider that calling public in its nature; on the other hand, if effective competition is proved as the regular course of things in a given industry, the law will hold all businesses within it as private in their character. Under our constitutional system a distinction is made upon this line. In the public calling regulation of service, facilities, prices and discriminations is possible to any extent. Monopolistic conditions demand such policy; and at no period in history has this been more apparent than now. In the private callings no such legislation should be permitted. Competitive conditions require freedom, and at no epoch in our industries has it been more important to insist upon this. But wherever there is virtual monopoly in a business of public importance at any time and from any cause, the protection of the law is requisite, requiring that all shall be served at reasonable rates.

§ 67. Law governing all public employments the same.

A great variety of public employments have been enumerated in this chapter as illustrations of those characteristics which establish the public duty of the common carrier. When later in this volume the subject of rate regulation is reached

advantage will be taken of the fact that these various public callings have been enumerated. And throughout the main portion of this book in the discussion of railway rate regulation, cases involving the regulation of rates of all the public services will be discussed together in the text and cited together in the footnotes. This is justifiable if the common carrier has been shown to be simply one example of a class of public callings, all of which are governed by the same law. And it was therefore necessary to devote some space in these introductory chapters to establishing that this class of public callings does exist and has common characteristics which require general law for its regulation.

CHAPTER III.

REQUISITES OF COMMON CARRIAGE.

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73. Carriage of passengers by servant of a carrier.
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TOPIC A.—BY WHOM THE CARRIAGE IS UNDERTAKEN.

§ 71. Who are common carriers.

A common or public carrier, whether of goods or of passengers, is one who is engaged in carrying as a public employment. "One who by virtue of his calling undertakes for compensation to transport personal property from one place to another for all such as may choose to employ him"—is one succinct definition.[1] "A person who undertakes to transport from place to place for hire the goods of those who choose to employ him"—is another.[2]

[1] Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 38, 52 N. E. 665, 70 Am. St. Rep. 432 (1899).

[2] Quoted from Elkins v. Boston & M. R. R., 23 N. H. 275 (1851).

See also various definitions in

FEDERAL COURT:

The Neaffie, 1 Abb. (U. S.) 465, 467, 17 Fed. Cas. 10,063 (1870).

STATE COURTS:

Alabama—Babcock v. Heiteit, 3 Ala. 392, 396, 37 Am. Dec. 695 (1842).

Illinois—Ill. Cent. R. R. v. Frankenberg, 54 Ill. 88, 95, 5 Am. Rep. 92 (1870).

Georgia—Fish v. Chapman, 2 Ga. 349, 352, 46 Am. Dec. 393 (1847).

Kentucky—Robertson v. Kennedy, 2 Dana (Ky), 430, 431, 26 Am. Dec. 466 (1834).

Massachusetts—Dwight v. Brewster, 1 Pick. (Mass.) 50, 53, 11 Am. Dec. 133 (1822).

New Hampshire—Shelden v. Robinson, 7 N. H. 157, 163, 26 Am. Dec. 726 (1834).

New Jersey—Mershon v. Hobensach, 22 N. J. L. 372, 377 (1850).

New York—Alexander v. Greene, 7 Hill (N. Y.), 533, 544 (1844).

Oregon—Honeyman v. Oregon, etc., R. Co., 13 Oreg. 352, 353, 10 Pac. 628, 57 Am. Rep. 20 (1886).

Common carriage, therefore, involves a certain kind of service performed under certain conditions. In order to determine whether a person is a common carrier, it must be determined first, whether his business is that of carrying, second, whether it is a public one. The first of these questions will be the one discussed in this chapter. This question itself has two branches; for the conception of carriage involves first that the carrier shall have control of the person or thing carried; second, that the carrier shall transport the person or thing carried.

§ 72. Carriage of goods by servant of a carrier.

It sometimes happens that a parcel is given to the servant of a carrier under such circumstances that it seems doubtful whether the servant or the master becomes the bailee and carrier. It is quite possible for the servant of a carrier to take and carry goods independently of his master, and when this is alleged to be the case all the circumstances must be examined to determine the question. If the shipper is aware that the carriage is a private matter, for the private gain of the servant, he cannot hold the master liable;[3] and so if he delivers to the servant to be carried gratuitously, as a matter of friendship, since such an arrangement is not a business arrangement and could hardly be supposed by the shipper to be made on the master's account.[4] But the mere fact that by an arrangement between the carrier and his servant the latter was to receive the

Pennsylvania—Beckman v. Shouse, 5 Rawle (Pa.), 179, 187, 28 Am. Dec. 653 (1835); Gordon v. Hutchinson, 1 W. & S. (Pa.) 285, B. & W. 3 (1841).

South Carolina—Bambeig v. So. Carolina R. Co., 9 S. C. 61, 67, 30 Am. Rep. 13 (1877).

West Virginia—Mashin v. Boston, etc., R. Co., 14 W. Va. 180, 188, 35 Am. Rep. 748 (1878).

Wisconsin—Doty v. Srong, 1 Pinn. (Wis.) 313, 326, 40 Am. Dec. 773 (1843).

England—Gisborn v. Hurst, 1 Salk, 249, B. & W. 2 (1700).

[3] Butler v. Basing, 2 C. & P. 613 (1827).

[4] Suarez v. The Washington, 1 Woods, 96, Fed. Cas. 13,585 (1870); Me-

compensation would not absolve the carrier from liability to the shipper.[5]

§ 73. Carriage of passengers by servant of a carrier.

One who is riding in the carrier's vehicle, not as ordinary passengers ride, but upon invitation of the carrier's servant, without paying fare, is not a passenger; his relation is with the servant, not with the carrier.[6]

Thus, where a yardmaster out of hours took an engine and car without permission of the defendant company, and invited persons to ride free in the car to a meeting, over a portion of the road not used for passenger trains, he was held not to have even apparent authority to act for the company, and the persons so riding were not passengers.[7] And where a party of children were invited by a servant of the carrier to ride on a train which was being shifted through the yard, they were not passengers.[8]

In a few cases however it has been held that children riding on a vehicle by invitation of a servant of the company are entitled to be regarded as passengers. Thus, where the driver of a street car invited children to ride on the front platform, they

chanics & T. Bank v. Gordon, 5 La. Ann. 604 (1850); Choteau v. Steamboat St. Anthony, 16 Mo. 216 (1852).

[5] Dwight v. Brewster, 1 Pick. (Mass.) 50 (1822); Beau v. Sturtevant, 8 N. H. 146 (1835); Mayall v. Boston & M. R. R., 19 N. H. 122 (1848); Farmers' & M. Bank v. Champlain T. Co., 23 Vt. 186 (1851).

[6] Waterbury v. New York C. & H. R. R. R., 17 Fed. Rep. 671 (riding on engine by consent of engineer) (1883); Atchison, T. & S. F. R. R. v. Headland, 18 Col. 477 (1893), 33 Pac. Rep. 185 (conductor induced to let plaintiff ride free on freight train); Toledo, W. & W. Ry. v. Brooks, 81 Ill. 245 (1876) (conductor induced to let plaintiff ride free on passenger train); Chicago & A. R. R. v. Michie, 83 Ill. 427 (1876) (riding on engine by consent of engineer); McVeety v. St. Paul, M. & M. Ry., 45 Minn. 268, 47 N. W. Rep. 809 (1891) (riding free on freight train); Woolsey v. Chicago, B. & Q. R. R., 39 Neb. 798, 58 N. W. Rep. 444 (1894) (riding on engine by consent of fireman, to shovel coal); Robertson v. New York & E. R. R., 22 Barb. (N. Y.) 91 (1856) (riding on engine by consent of engineer).

[7] Chicago, S. P. M. & O. Ry. v. Bryant, 65 Fed. Rep. 969 (1895).

[8] Reary v. Louisville, N. O. & T. Ry., 40 La. Ann. 32, 3 So. Rep. 390 (1888).

were held to be passengers;[9] and where a conductor invited a boy to ride in a freight train (on which passengers were sometimes carried) the boy was held to be a passenger.[10] But these cases can hardly be supported on this point. The children concerned were clearly guests of the servant, not of the carrier. However far the apparent authority of a conductor may be held to extend, it cannot cover an invitation to ride free; free carriage is not the carrier's business.

If one riding free by invitation of a servant is not a passenger, *a fortiori* one who by misrepresentation induces the servant to let him ride free is not a passenger;[11] and still more clearly one who bribes the servant by a small fee to let him ride without paying the regular fare is not a passenger.[12]

It will be noticed that the cases follow closely the principle that the carrier must accept the passenger; and that to prove himself a passenger one must prove either actual acceptance as such by a servant having authority, or else an exact compliance with the terms of an invitation extended by the carrier to the public.

§ 74. Carrier must control the thing carried.

In order to be a carrier, rather than a mere furnisher of motive power, the person in question must take control of some sort over the thing to be carried, whether it be a chattel or a person. There is to be sure a difference in the degree of control exer-

[9] Wilton v. Middlesex R. R., 107 Mass. 108 (1871); Muehlhausen v. St. Louis R. R., 91 Mo. 332, 2 S. W. Rep. 315 (1886); Buck v. Power Co., 108 Mo. 185, 18 S. W. Rep. 1090 (1891).

[10] St. Joseph & W. R. R. v. Wheeler, 35 Kan. 185, 10 Pac. Rep. 461 (1886); Sherman v. Hannibal & S. J. R. R., 72 Mo. 62 (1880) (*semble*); Whitehead v. St. Louis, I. M. & S. Ry., 99 Mo. 263, 11 S. W. Rep. 751 (1889).

[11] Condram v. Chicago, M. & S. P. Ry., 67 Fed. Rep. 522 (1895).

[12] McNamara v. Great Northern Ry., 61 Minn. 296, 63 N. W. Rep. 726 (1895); Janny v. Great Northern Ry., 63 Minn. 380, 65 N. W. Rep. 450 (1896); Brevig v. Chicago, S. P. M. & O. Ry., 64 Minn. 168, 66 N. W. Rep. 401 (1896).

cised in the two cases. The carrier of goods assumes possession of the goods; he is a bailee, and without a bailment the relation of carrier of goods cannot be established. A human being cannot be the subject of bailment, and a carrier of passengers is therefore not a bailee, and has no technical possession of the person carried; but he does come into such a relation with the passenger as puts the latter for the time being to a considerable extent under the carrier's control. No one can be a carrier, therefore, whose business does not involve either a bailment of goods or the establishment of such a degree of control over a person as is involved in his becoming a passenger. Many illustrations of these several principles are discussed in the sections which follow.

TOPIC B.—WHETHER THERE HAS BEEN ACCEPTANCE OF PASSENGERS AND THEIR BELONGINGS.

§ 75. Carriage in vehicle not intended for passengers.

In general, a carrier who by his servants receives a person to be carried on any vehicle or portion of a vehicle not provided by the carrier for passengers is not a common carrier of such person; nor can such person demand to be carried in such a vehicle or place. On this principle, a railroad is not a common carrier of a person who by permission of the carrier's servant or otherwise rides on a locomotive,[1] a hand car,[2] or a flat car.[3]

[1] Lake Shore, etc., R. Co., v. Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510 (1887); Merrill v. Eastern R. Co., 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705 (1885); Robertson v. N. Y., etc., R. Co., 22 Barb. (N. Y.) 91 (1856); Rucher v. Missouri Pac. R. Co., 61 Tex. 499 (1884); Wilcox v. San Antonio R. Co., 11 Tex. Civ. App. 487, 33 S. W. 379 (1895).

[2] Willis v. Atlantic, etc., R. Co., 120 N. C. 508, 26 S. E. 784 (1897); Cincinnati, etc., R. Co. v. Morley, 4 Ohio Cir. Ct. 559 (1890); Rathbone v. Oregon R. Co., 40 Oreg. 225, 66 Pac. 909 (1901).

[3] 3 Higgins v. Cherokee R. R., 73 Ga. 149 (1884) (*semble*); Snyder v. Natchez, R. R. & T. R. R., 42 La. Ann. 302, 7 So. Rep. 582 (1890).

On the same principle a railroad is not a common carrier of one who is received by its servants for carriage on a construction train.[4] In such a case the court said: "It is clear that defendant's train was not a passenger train within the meaning of the law, and that plaintiff's intestate was not a passenger, entitled, as a matter of legal right, to ride upon the train. The evidence, favorably stated for the plaintiff, shows that defendant owed no duty to plaintiff's intestate as a passenger."[5]

§ 76. Carriage on freight cars.

It often happens, however, that a person is received by the carrier's servant into a vehicle not prepared for passengers, and is permitted to ride there. Such a reception will of course make the person a passenger provided the reception is within the authority of the servant; either because of express permission given by the carrier, or because the reception is within the apparent authority of the servant. A case of the first kind occurs when a railroad is accustomed to carry passengers in freight cars. Where such a custom exists, one received on a freight train is to be regarded as a passenger quite as much as one who rides on an ordinary passenger train. A case of the second kind occurs when passengers are not uncommonly so car-

[4] McCauley v. Tennessee, C. I. & R. R. Co., 93 Ala. 356, 9 So. 611 (1891); Berry v. Missouri Pac. Ry., 124 Mo. 223, 25 S. W. 229 (1894); Graham v. Toronto, G. & B. Ry., 23 Up. Can. C. P. 541 (1874).

[5] Quoted from Berry v. Missouri Pac. Ry., *supra*.

See accord: Shoemaker v. Kingsbury, 12 Wall. (U. S.) 369, 20 L. Ed. 432 (1871); Albion Lumber Co. v. DeNobra, 72 Fed. 739, 44 U. S. App. 347, 19 C. C. A. 168 (1896); Wade v. Futcher, etc., Cypress Lumber Co., 74 Fed. 517, 33 L. R. A. 255, 41 U. S. App. 45, 20 C. C. A. 515 (1896); Menaugh v. Bedford Belt R. Co., 157 Ind. 20, 60 N. E. 694 (1901); Evansville & R. R. R. Co. v. Barnes, 139 Ind. 254, 36 N. E. 1092 (1894); Nashville, etc., R. C. v. Messino, 1 Sneed. (Tenn.) 220 (1853). See San Antonio & A. P. Ry. v. Robinson, 79 Tex. 608, 15 S. W. 584 (1891). Sheerman v. Toronto, etc., Ry., 34 U. C. Q. B. 451 (1874); Graham v. Toronto, etc., Ry., 23 V. C. C. P. 541 (1874); McRae v. Canada Pacific Ry., Montreal, L. R., 4 S. C. 186 (1888).

ried on freight trains in that part of the country, and one is permitted to ride on such a train by the conductor. When for any reason the conductor has apparent authority to receive a passenger, and does so, the relation of carrier and passenger is established.[6]

In one case it appeared that the passenger was informed by a servant of the carrier that he could not, under the carrier's rules, attach his own freight car to a passenger train and ride in it, as he desired to do; but the servant afterwards permitted it. He was held to be a passenger.[7] If the case can be supported, it must be on the ground that under the circumstances of the case he had reason to suppose that the permission of the carrier had been obtained.

[6] Federal Courts:

Hazard v. Chicago, B. & Q. R. R., 1 Biss. 503, Fed. Cas. 6,275 (1865); Reber v. Bond, 38 Fed. Rep. 822 (1889).

State Courts:

Illinois—Ohio & M. R. R. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336 (1861); *Indiana*—Ohio & M. Ry. v. Dickerson, 59 Ind. 317 (1877).

Kansas—Missouri P. Ry. v. Holcomb, 44 Kan. 332, 24 Pa. 467 (1890).

Mississippi—Perkins v. Chicago, S. L. & N. O. R. R., 60 Miss. 726 (1883).

Missouri—Whitehead v. St. Louis, I. M. & S. Ry., 99 Mo. 263, 11 S. W. R. 751 (1889).

Nebraska—Chicago, B. & Q. R. R. v. Troyee, 103 N. W. 680 (Neb. 1905).

New Hampshire—Murch v. Concord R. R., 29 N. H. 9, 61 Am. Dec. 631 (1854).

New York—Edgerton v. New York & H. R. R. R., 39 N. Y. 227 (1868).

Texas—I. & G. N. Ry. v. Irvine, 64 Tex. 529 (1885).

So in a similar case of one riding on an engine: Lake Shore & M. S. R. R. v. Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510 (1887); or on a gravel train. Lawrenceburgh & U. M. R. R. v. Montgomery, 7 Ind. 474 (1856).

[7] Lackawanna & B. R. R. v. Chenowith, 52 Pa. 382 (1866).

§ 77. Carriage in a place not intended for passengers.

When a person desiring to be transported enters a car or other part of a railroad train not intended for passengers, he does not thereby accept the carrier's invitation; and if there is no express acceptance of him as a passenger he is not entitled to be so treated. In a Texas case[8] it appeared that an intending passenger, having money to pay his fare, came late to the station, and was just able to get on board the front platform of the first car as the train started. This proved to be the front platform of a baggage car. The fireman, discovering him, compelled him to jump off by turning hot water from a hose on him; and in jumping he was injured. The Court of Civil Appeals held that he could recover as a passenger. "While," they said, "the place one may be occupying upon the train at the time of his injury may be important in determining whether or not he intended to pay his fare, it does not conclusively fix his status, either as a passenger or a trespasser. It may be conceded that a person found in the position occupied by Eaton Williams at the time he was injured is subject to the suspicion of being a trespasser; but if such person, having the means and intending to pay his fare, can, as Eaton Williams in this case did, give a reasonable excuse for why he was not in a passenger coach, he will, in law, be a passenger, and entitled to protection against the wrongful acts of the railroad company and its employes. Neither the carrier nor its employes can assume that a person on any car of a passenger train is a trespasser, and, if they treat him as a trespasser merely because he is not in one of the cars provided for, and usually occupied by, a passenger, and injury results therefrom, and the facts show that he is a passenger, the railroad company will be liable."

This decision was however reversed on appeal to the Supreme Court. One may become a passenger, the court said, by either

[8] Missouri, K. & T. Ry. v. Williams (Tex. Civ. App.) 40 S. W. 350 (1897).

an express or an implied contract. There was no express contract in this case; and "in order to raise such an implied contract, the party desiring to be carried by the railroad company must take passage on that part of the train provided by it for carrying passengers." [9]

§ 78. Whether there is acceptance in such cases.

A case almost identical in its facts was decided in South Carolina between the first decision and the appeal in the Texas case; and largely on the authority of the Texas Court of Civil Appeals the plaintiff was held to be a passenger.[10] Chief Justice McIver dissented, taking the same ground on which the Supreme Court placed itself in the Texas case. If, he said, "the plaintiff, with his ticket in his pocket, had got on the pilot, or the engine itself, or upon the tender, or upon the express car, it certainly could not, with any propriety, be said that he had thereby established the relationship of passenger between himself and the company. Why? Simply because such places are not the proper places for passengers to be received or transported; and it seems to me that the same may be said of a baggage car. If, then, the relationship of passenger and carrier had not been established between plaintiff and defendant at the time of the accident, it is clear that the defendant company owed no duty to the plaintiff except such as it might owe him as a trespasser."

The reasoning of the dissenting opinion is hard to resist. The case is not like that of taking a wrong train by mistake; for there the person gets into a car intended for passengers, while here, as the chief justice pointed out, he knew that a baggage

[9] Missouri K. & T. Ry. v. Williams, 91 Tex. 255, 42 S. W. Rep. 855 (1897). It is hard to see how the defendant could escape liability under the circumstances even by proving that the plaintiff was not a passenger; since the injury was wanton, and was apparently inflicted in the carrier's service.

[10] Martin v. Southern Ry., 51 S. C. 150, 28 S. E. Rep. 303 (1897).

car was not prepared for the reception of passengers. The haste with which the plaintiff took the train has prevented him from so taking it as to make himself a passenger by bringing himself within the terms of the company's invitation. Yet it must be clear that he can be treated in no worse way than an innocent trespasser; and if wantonly injured by a servant of the company in the course of his employment, the carrier should be liable. It was urged in the dissenting opinion in the South Carolina case that the servant was not acting in the course of the employment; but this view would seem to be mistaken.

The same facts came up in Illinois, and it was held that the person did not become a passenger by getting safely upon the platform.[11] "A passenger must put himself in the care of the railroad company, and there must be something from which it may fairly be implied that the company had accepted him as a passenger."

The distinction is to be noted between persons who having once become passengers then go without permission of the company into some place not provided for passengers, and persons who, intending to become passengers, go in the first instance to such a place. While the latter do not technically become passengers at all, since they never place themselves within the terms of the carrier's offer to receive them,[12] persons who have already become passengers do not forfeit that position by going into some car or some part of a car in which passengers are not allowed to ride. Such conduct may be negligent, and if the negligence contributes to an injury it may therefore bar recovery for the injury; but the recovery cannot be denied on the ground that the injured person was not a passenger.[13]

[11] Illinois Cen. R. R. v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 61 Am. St. Rep. 68, 39 L. R. A. 148 (1897).

[12] Bricker v. Campbell, 132 Pa. 1, 18 Atl. 983 (1890).

[13] Kentucky C. R. R. v. Thomas, 79 Ky. 160, 42 Am. Rep. 208 (1880) (express car); Bard v. Pennsylvania Traction Co., 176 Pa. 97, 34 Atl. 953, 53 Am. St. Rep. 672 (1896) (bumper of street car); Little Rock

§ 79. **Luggage carried in car with passenger.**

Where a passenger takes with him in the vehicle in which he is carried small articles of personal baggage it may be difficult to determine how far the responsibility of the carrier extends to them. It was clearly stated in an early English case that the carrier would be responsible for it: "If a man travel in a stage-coach and take his portmanteau, with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost."[14] And this doctrine has been extended to the case of railway carriage. If the railway porter takes luggage to carry for a passenger and places it in the train or in a cab, and it is lost, before it is redelivered to the passenger, the carrier is doubtless liable as such,[15] the responsibility beginning when the luggage is delivered to the porter. The language used in several cases goes further, and appears to hold that where the luggage is placed by the porter in the carriage with the passenger the carrier continues responsible as such, being still in possession of the luggage.[16] That this would be true if the luggage is placed in the carriage of the passenger, not at the request of the latter, but for the carrier's convenience, is, of course, clear; and this would be even more obvious if the passenger objected to such disposition of the luggage;[17] but the

& F. S. Ry. v. Miles, 40 Ark. 298, 40 Am. Rep. 10 (1883) (top of freight car); Merrill v. Eastern R. R., 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705 (1885) (step of steam-car); New Orleans & N. E. R. R. v. Thomas, 60 Fed. 379, 9 C. C. A. 29, 23 U. S. App. 37 (1894) (top of cattle-car).

[14] Chambre, J., in Robinson v. Dunmore, 2 B. & P. 416, 419 (1834).

[15] Richards v. London & B. Ry., 7 C. B. 839, 18 L. J. (C. P.) 251 (1849); Butcher v. London & S. W. Ry., 16 C. B. 13, 24 L. J. (C. P.) 137 (1855); Le Conteur v. London & S. W. Ry., 6 B. & S. 961, L. R. 1 Q. B. 54 (1865).

[16] Munster v. South Eastern Ry., 4 C. B. (N. S.) 676, 27 L. J. (C. P.) 308 (1858); Le Conteur v. London & S. W. Ry., 6 B. & S. 961, L. R. 1 Q. B. 54 (1865); Talley v. Great Western Ry., L. R. 6 C. P. 44 (1870).

[17] Munster v. South Eastern Ry., 4 C. B. (N. S.) 676, 27 L. J. (C. P.) 308 (1858).

English courts go further: "It is the every-day's practice of passengers by railways to carry cloaks and such like articles with them in the carriages, with the consent of the company, and it cannot be said that the company have on that account parted with their custody of them as carriers." [18] It is, however, clear that the carrier is not, under such circumstances, an insurer and that the amount of care required of it is materially lessened by the fact that the passenger is in actual control.[19]

§ 80. American rule as to luggage carried by passenger.

In this country (very likely because of a different usage as to the matter, the railroad company here not taking charge of personal luggage, as a matter of course, by its porters or other servants) it has never been supposed that the railroad company assumed possession of personal luggage taken into its train by a passenger; and it has therefore never been held liable for such luggage as carrier.[20]

And so a steamboat company is not a carrier of the passenger's watch and clothing, which he wears on his person, or the

[18] Lush, J., in Le Conteur v. London & S. W. Ry., *supra*.

[19] Talley v. Great Western Ry., L. R. 6 C. P. 44 (1870).

[20] *United States*—Henderson v. Louisville & N. R. R., 123 U. S. 61, 31 L. Ed. 92 (1887); Walsh v. The Wright, Newb. 494, Fed. Cas. 17,115 (1854).

Massachusetts—Murray v. International St. Ship Co., 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290 (1898); Kingsley v. Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200 (1878).

Mississippi—Illinois Cent. R. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 346 (1886).

New York—Weeks v. New York, etc., R. Co., 72 N. Y. 50, 28 Am. Rep. 104 (1878); Schalscha v. Third Ave. R. Co., 19 Misc. (N. Y.) 141, 43 N. Y. Suppl. 251 (1897); Tower v. Utica & S. R. R. Co., 7 Hill (N. Y.), 47, 42 Am. Dec. 36 (1844).

Ohio—Greenfield First Nat. Bank v. Marietta, etc., R. Co., 20 Ohio St. 259, 5 Am. Rep. 655 (1870).

Pennsylvania—American Steamship Co. v. Bryan, 83 Pa. St. 446 (1877).

Texas—Bonner v. Demendoya (Texas App., 1891), 16 S. W. 976 (1891).

luggage he takes with him into his stateroom, since the possession of it is not given to the company.[21]

Sleeping car companies are held not liable for hand baggage of passengers upon the same principles, but of course the danger from theft from sleeping passengers being peculiar, the company owes to them the utmost protection, and the porter must keep continual watch.[22]

[21] *United States*—The R. E. Lee, 2 Abb. (U. S.) 49, Fed. Cas. 11,690 (1870); Walsh v. The H. M. Wright, Newb. Adm. (U. S.) 494, Fed. Cas. No. 17,115 (1854).

Kentucky—Steamboat Crystal Palace v. Vanderpoot, 16 B. Mon. (Ky.) 302 (1855).

Maine—Abbott v. Bradstreet, 55 Me. 530 (1868).

Massachusetts—Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 456 (1875).

Michigan—McKee v. Owen, 15 Mich. 115 (1866).

Pennsylvania—American St. Ship Co. v. Bryan, 83 Penn. St. 446 (1877).

Wisconsin—Gleason v. Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716 (1873).

Contra, New York—Gore v. Norwich Trans. Co., 2 Daly (N. Y.) 254 (1867); Mudgett v. Bay State St. Beat Co., 1 Daly (N. Y.) 151 (1861); Van Horn v. Kermit, 4 E. D. Smith (N. Y.) 453 (1855); Crozier v. Boston, etc., Steamboat Co., 43 How. Pr. (N. Y.) 466 (1871). These cases place the liability of the company on the same ground as that of an innkeeper.

[22] *United States*—Barrott v. Pullman's Palace Car Co., 51 Fed. 796 (1892).

Alabama—Cooney v. Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690 (1898); Pullman Palace Car Co. v. Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767 (1898).

Georgia—Pullman's Palace Car Co. v. Martin, 95 Ga. 314, 22 S. E. 700, 29 L. R. A. 498 (1894).

Kentucky—Pullman's Palace Car Co. v. Hunter, 21 Ky. 1248, 54 S. W. 845, 47 L. R. A. 286 (1900); Pullman's Palace Car Co. v. Gaylord, 9 Ky. L. Rep. 58 (1887).

Mississippi—Ill. Cent. R. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846 (1886).

Missouri—Hampton v. Pullman Car Co., 42 Mo. App. 134 (1890); Wilson v. Baltimore, etc., R. Co., 32 Mo. App. 682 (1888); Root v. N. Y. Cent. Sleeping Car Co., 28 Mo. App. 199 (1887).

New York—Williams v. Webb, 22 Misc. (N. Y.) 513, 49 N. Y. Suppl. 1111, 27 Misc. (N. Y.) 508, 58 N. Y. Suppl. 300 (1899).

TOPIC C.—WHETHER THERE HAS BEEN BAILMENT MADE OF GOODS.

§ 81. Owner accompanies the goods and retains possession.

If the owner of goods goes along with them and retains possession of them, the person who furnishes the vehicle is not a carrier, since he is not a bailee. This was the position of affairs presented by the leading case of the East India Company v. Pullen.[1] The defendant in that case was a common lighterman. "It was the usage of the company on the unshipping of their goods to clap an officer, who is called a guardian, in the lighter, who, as soon as the lading is taken in, puts the company's lock on the hatches, and goes with the goods to see them safe delivered at the warehouse." This usage having been followed, and part of the goods lost, the company sued the defendant. At the trial, before Lord Chief Justice Raymond, the court "was of opinion this differed from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself. He thought, therefore, the action was not maintainable, so the plaintiffs were nonsuited." [2]

§ 82. Owner accompanies the goods without retaining possession.

If the shipper or his servant merely goes along with the goods and has an eye on them for greater security, while the carrier has the possession or general control, the carrier becomes re-

Pennsylvania—Pfaelzer v. Pullman Palace Car Co., 4 Wkly. Notes Cas. (Pa.) 240 (1877).

Texas—Pullman Palace Car Co. v. Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31 (1887).

[1] 1 Strange, 690 (1726).

[2] See, also, White v. Winnisemmet Co., 7 Cush. 155 (1851); New York v. Starin, 106 N. Y. 1, 12 N. E. 631 (1887).

sponsible as such upon assuming possession. So, where a servant of the shipper went along with the carrier, on account of the carrier being a stranger to the shipper, this was held not to negative the carrier's responsibility, the case being distinguished from the usage of the East India Company, "who never intrust the lighterman with their goods, but give the whole charge of the property to one of their officers." In this case, the court said the defendant "must have had possession of them for the purpose of carrying his contract into effect, which he could not have done without such possession." [3]

§ 83. Cattle carried with a drover furnished by the owner.

Though the owner of cattle or his servant may accompany the cattle, as a drover, while they are being carried, and may care for them, feed and water them, and help load and unload them, the railroad company is none the less the bailee and carrier of the cattle; "he must do all this while the cattle are in the possession of the railroad company and at such times as it chooses to select for the purpose." [4]

§ 84. Goods taken across a ferry by the owner.

In the case of a ferry, the fact that the owner usually goes along with the goods and often retains the entire charge and management of them (as for instance where he drives a horse on the ferryboat and manages him while on the boat), materially modifies the relation of carrier and shipper, so that the carrier

[3] Robinson v. Dunmore, 2 B. & P. 416 (1801). See, also, Brind v. Dale, 8 Cas. & P. 207 (1837); Cohen v. Frost, 2 Duer, 335 (1853); Hollister v. Nowker, 19 Wend. (N. Y.) 234 (1838).

[4] Dennison, J., in Atchison, T. & S. F. R. R. v. Ditmars, 3 Kan. App. 459, 43 Pac. 833 (1896). To the same effect, McAlister v. Chicago, R. I. & P. R. R., 74 Mo. 351 (1881; D. U. Verrick v. Mo. Pac. R. R., 57 Mo. App. 550 (1891); Feinberg v. Delaware, L. & W. R. R., 52 N. J. L. 451, 20 Atl. 33 (1889); Harris v. Northern Indiana R. R., 20 N. Y. 232 (1859).

may not be responsible for any injury caused by defect in placing or managing the property; but this does not necessarily prevent the ferryman from being a carrier. So in the leading case of White v. Winnisimmet Co.,[5] Mr. Justice Dewey said: "To a certain extent, persons keeping and maintaining a ferry are common carriers, and subject to the liabilities attaching to common carriers. It would be so, if a bale of goods or an article of merchandise was delivered by the owner to the agent of a ferry company, to be carried from one place to another for hire. . . . The principle above stated would embrace the case of a horse and wagon received by a ferryman to be transported by him on a ferry-boat, the ferryman accepting the exclusive custody of the same for such purpose, and the owner having, for the time being, surrendered the possession to the ferryman."[6] Where the ferryman takes such charge of the passenger's goods (as was probably the ordinary case in the older ferries), the ferryman is a carrier of the goods as well as of the passenger.[7]

The modern ferryman, however, seldom concerns himself with the property of the traveller; and while he is, of course, a carrier of the passenger, the goods are not so bailed to him as to constitute him a carrier of the goods. As Mr. Justice Dewey said further, in his opinion already cited:[8] "But the traveller uses the ferry-boat as he would a toll-bridge, personally driving his horse upon the boat, selecting his position on the same, and himself remaining on the boat; neither putting his horse into the care and custody of the ferryman, nor signifying to him or his servants any wish or purpose to do so; and the only possession and custody, by the ferryman, of the horse and vehicle to which he is attached, is that which necessarily results from the traveller's driving his horse and wagon, or other vehicle, on

[5] 7 Cush. (Mass.) 155 (1851).

[6] See, also, New York v. Starin, 106 N. Y. 1, 12 N. E. 631 (1887).

[7] Walker v. Jackson, 10 M. & W. 161 (1842); Wilsons v. Hamilton, 4 Ohio S. 722 (1855); Cook v. Gourdin, 2 N. & McC. (S. C.) 19 (1819).

[8] White v. Winnisemmet Co., *supra*.

board the boat, and paying the ordinary toll for a passage. . . . The case of such a traveller, though not entirely similar, much more resembles that of a traveller upon a toll-bridge or turnpike road; who, while he uses the easement of another, yet retains the possession and custody of his horse and wagon."[9]

§ 85. Goods carried across a bridge.

A bridge company which owns a bridge used by a railroad company is not a carrier of the goods hauled over it by the railroad; even if the bridge company itself furnishes the motive power for hauling cars over its tracks. While it hauls the cars, it has no possession of the contents of the cars, which are at all times in the possession of the railroad company as the only carrier.[10] On the same principle an ordinary toll-bridge is not a common carrier.[11]

§ 86. Issue of bill of lading without receipt of goods.

Since a bailment is required before the carrier of goods becomes responsible as such, it must be clear that without such bailment one cannot be a carrier of goods. It sometimes happens that a bill of lading is issued by the servant of a carrier without a delivery to the carrier of the goods named in the bill. Such issue of a bill of lading does not make the carrier responsible as a carrier for the goods described in the bill.[12]

[9] To the same effect, Frierson v. Frazier (Ala.), 37 So. 825 (1904); Wyckoff v. Queen's County Ferry Co., 52 N. Y. 32, 11 Am. Rep. 650 (1873).

[10] Kentucky & I. Bridge Co. v. Louisville & M. R. Ry., 37 Fed. 567, 2 L. R. A. 289 (1889). But in Norfolk & P. Belt Line Co. v. Com., 103 Va. 289, 49 S. E. 39 (1904), a switching company was held to be a common carrier.

[11] Griegsby v. Chappell, 5 Rich. L. (S. C.) 443 (1852).

[12] Schooner Freeman v. Buckingham, 18 How. (U. S.) 182 (1855); Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998 (1881); The Loon, 7 Blatch. 244, Fed. Cas. 8,499 (1870); Fellows v. The Powell, 16 La. Ann. 316, 79 Am. Dec. 581 (1851); Baltimore & O. R. R. v. Wilkens, 44 Md. 11, 22

In some jurisdictions, to be sure, it has been held that if a bill of lading was issued by the proper agent of the carrier and was indorsed for value to a bona fide purchaser, the carrier could not as against him dispute the receipt of the goods,[13] and where a carrier issued two bills of lading for the same goods, and the two bills came into the hands of two holders for value and without notice, it was held that the carrier could not dispute the receipt of two lots of goods.[14] But this is based on the doctrine of estoppel; the carrier is not responsible as such on the real facts, but in this particular case the real facts cannot be shown.

TOPIC D.—TRANSPORTATION NECESSARY FOR THE CONCEPTION OF CARRIAGE.

§ 87. Carrier must undertake transportation.

Supposing a bailment of goods or an acceptance of a passenger, it is still necessary in order to have a case of carriage that transportation should be furnished, or at least undertaken. One who does not undertake to transport goods or a passenger cannot be a carrier, whatever else he may be, although he may be engaged in a public employment analogous to that of the carrier. To carry on transportation a vehicle of some sort is almost indispensible. The vehicle used is immaterial. Thus, a common carrier may transport on a sled hauled by an ox-team.[1] But a "slide" constructed in a river to facilitate the

Am. Rep. 26 (1875); Sears v. Wingate, 3 All. (Mass.) 103 (1861); Louisiana Nat. Bank v. Lavielle, 52 Mo. 380 (1873); Williams v. Wilmington & W. R. R., 93 N. C. 42 (1885); Dean v. King, 22 Ohio St. 118 (1871); Grant v. Norway, 10 C. B. 665 (1851).

[13] Wichita Sav. Bank v. Atchison, T. & S. F. R. R., 20 Kan. 519 (1878); Sioux City & P. R. R. v. First Nat. Bank, 10 Neb. 556 (1880); Armour v. Michigan C. R. R., 65 N. Y. 111, 22 Am. Rep. 603 (1875); Brooke v. New York, L. E. & W. R. R., 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235 (1885).

[14] Coventry v. Great Eastern Ry., 11 Q. B. D. 776 (1883).

[1] Robertson v. Kennedy, 2 Dana (Ky.) 430 (1834).

passage of logs is not a carrier; not only does it not carry, but it is not even a bailee.[2]

§ 88. Storage hulks not carriers.

It is plain, of course, that those who purport to provide storage and nothing more, as wharfingers, warehousemen, grain elevator owners and cold storage proprietors, are in no sense carriers, since they do not purport to transport property. A test case for this may be found in New Zealand.[3] There meat was received into a cold storage hulk, which was afloat in the harbor but moored for the season near to the wharves, to be kept until opportunity served to despatch the meat by steamers to foreign ports. The meat was injured, and the contention was that the law of common carriers applied. On that point Mr. Justice Denneston said: "I do not see that the fact of the subject-matter of this contract being, or having been, a ship and being afloat, in any way affects the position of the parties. The contract is for the hire of a store and machinery, the lessors to supply men and to do certain work on the goods stored. If this be so, it disposes of the applicability of a great majority of cases cited. The strong inclination both in the courts and the legislature to limit the attempts of common carriers by sea and land to contract themselves out of this liability for negligence seems based upon the same grounds, which originally led to their being saddled with the liability of insurers; the difficulties of proof where incidents must be within the knowledge mainly of the carrier and his servants, and the fact that in the cases of railway companies at least, they could often, if not restrained by law, dictate their own terms. I take the defendant company to be simply the bailee of the plaintiff company of the sheep

[2] Queen v. McFarlane, 7 Can. 216 (1882).

[3] Canterbury Meat Co. v. Shaw & Co., 7 L. R. New Zealand, 708 (1889).

frozen by it; what is called in the notes to Coggs v. Bernard, *locatio operis faciendi.*" [2]

§ 89. Log drivers not carriers.

A log-driver is not a carrier; for though he may take possession of the logs as a bailee, he does not undertake to carry, but only to perform certain services while the logs are being carried by a natural force. "This kind of service differs very much from the possession and transfer of articles which are always in custody, and which could not be moved except by the vehicles of the carrier. . . . The entire absence of any motive power, and the function of guiding and regulating things which move themselves or are moved by some independent force, make it impossible to treat these classes of business as carriage in fact, and it is difficult to see how, if involving no carriage, there is any propriety in calling them carriage." [5] A log-driving company is, however, probably in the public employment.[6]

§ 90. Drovers of cattle not carriers.

An agister of cattle, although a bailee, is not a carrier; for the transportation is furnished not by the agister, but merely by the cattle themselves. "Drovers, or as the common law calls them, agisters, perform functions not unlike those of log drivers. Their animals move themselves, while logs are moved by the stream, and the beasts have a species of intelligence, while logs and currents move unconsciously. Yet the chief business of the men in charge of both is to prevent the property

[2] Citing Smith's Leading Cases (8th Ed.), p. 232.

[5] Campbell, J., in Mann v. White River L. & B. Co., 46 Mich. 38, 41 Am. Rep. 141 (1881).

[6] Weymouth v. Penobscot L. D. Co., 71 Me. 29, B. & W. 27 (1880); (where, however, the public duty may have rested on the legal monopoly granted).

from straying or stopping, and to guide it where it belongs. No one regards drovers as carriers."[7]

§ 91. Vehicles leased for carriage.

When the owner of a vehicle makes a lease of it to another party, who uses it for the carriage of goods, plainly the lessor is not the carrier. Thus, in Bell v. Pidgeon,[8] the owner of some scows which he used in his business leased them to others for the transportation of their chalk. It was held that the owner was in no sense a carrier, since he neither took possession nor furnished the motive power. But in Campbell v. Perkins,[9] where the defendants owned a line of boats, and used them as common carriers of passengers and goods, and chartered one of them to another company for a single trip, but retained the charge of it, and of navigating it, it was held that they were liable to a passenger for the loss of his baggage.

§ 92. Shipper furnishes servants to manage the vehicle.

So where the shipper himself furnished the cars and brakemen, this was held not to affect the liability of the carrier, the entire train while on the route being under the control and management of the conductor and other servants of the carrier.[10]

In a case in the Supreme Court of the United States the carrier was engaged in transporting a body of soldiers and their baggage. The soldiers packed their own baggage in a car selected by themselves, and it was asserted that an armed guard

7 Campbell, J., in Mann v. White River L. & B. Co., 46 Mich. 38, 40, 41 Am. Rep. 141 (1881).

8 5 Fed. 634 (1882). And see to the same effect, Lamb v. Parkman, 1 Sprague 343, Fed. Cas. 8,020 (1857); Phelps v. Windsor T. B. Co., 131 N. C. 12, 42 S. E. 335 (1902).

9 4 Sheldon (N. Y.) 430 (1855).

10 Mallory v. Tioga R. R., 39 Barb. (N. Y.) 488 (1862).

accompanied the baggage.[11] Mr. Justice Field, speaking for the court, said: "If it were admitted that a special guard was appointed for the car on the route, the admission would not aid the company or relieve it of liability. The control and management of the car, or of the train, by the servants and *employees* of the company, were not impeded or interfered with; and where no such interference is attempted, it can never be a ground for limiting the responsibility of the carrier that the owner of the property accompanies it and keeps a watchful lookout for its safety."

TOPIC E.—WHEN TRANSPORTATION IS FURNISHED BY OTHERS.

§ 93. Leased railways.

The history of railways in this country has been one of constant combination of the existing roads into longer lines. This is sometimes accomplished by a consolidation of two railway corporations into one. But it is frequently done by leasing one railway to another, the latter road then operating both.

Where this is the case, it must be clear that the operating road is *ipso facto* a common carrier, and cannot escape liability as such by proving its lack of statutory authority. It is in fact carrying on the business of carriage over the whole line.[1]

The leased road, on the other hand, has evidently gone out of the business of carrying, and can no longer be held to be a carrier, though it may, as a corporation, continue liable for the reception and safe carriage of persons or goods because of some provision in its charter.[2]

[11] Hannibal & S. J. R. R. v. Swift, 12 Wall. (U. S.) 262 (1878).

[1] McCheer v. Manchester & L. R. R., 13 Gray (Mass.), 124, 74 Am. Dec. 624 (1859); Feital v. Middlesex R. R., 109 Mass. 398, 12 Am. Rep. 720 (1872).

[2] Langley v. Boston & M. R. R., 10 Gray (Mass.), 103 (1859).

§ 94. Chartered accommodations.

If an entire train, including the motive power, be chartered to a person who undertakes the entire management himself, the railroad is not a carrier of goods or persons carried on the train.[3]

And so, where a railroad simply loaned a train to an association of railroad employers, who themselves operated and managed the train, the railroad was held not to owe the duty of a common carrier to persons riding on the train.[4]

But where a single car is chartered and loaded by a shipper, and is then taken by the railroad for transportation, on its regular trains, the railroad is a carrier of the goods loaded in the car.[5]

§ 95. Refrigerator car lines not carriers.

By a practice now prevailing fruit is carried in refrigerator cars, which are arranged to contain ice. These cars were formerly provided in small numbers by the railroads themselves, but they are now substantially all owned by a private corporation.[6]

The position of such a corporation is obviously much like that of a sleeping car company. It is not a carrier; the railway company performs the carriage, the refrigerator car line furnishing only certain additional accommodations and conveniences. But though not technically a carrier, the refrigerator car line is carrying on a business which is of public im-

[3] East Tenn. & Ga. R. R. v. Whittle, 27 Ga. 535 (1859).

[4] Davis v. Chicago, St. P. M. & O. R. R., 45 Fed. 543 (1891).

[5] Fordyce v. McFlynn, 56 Ark. 424, 19 S. W. 961 (1892); Central R. R. v. Anderson, 58 Ga. 393 (1877); Ohio & M. R. R. v. Dunbar, 20 Ill. 623 (1858). In Kimball v. Rutland & B. R. R., 26 Vt. 247 (1854), the contrary doctrine seems to be stated, but on examination it will appear that the question was really concerning the degree of responsibility of the railroad.

[6] The Armour Car Lines; see Re Transportation of Fruit, 10 I. C. R. 360 (1905).

portance in connection with the railway, and like the sleeping-car company, it is therefore engaged in a public employment which, though not identical with that of a common carrier, is analogous to it, and imposes similar legal obligations upon the corporation.

The same thing would, of course, be true of a tank car line. As a matter of fact the tank car lines seem usually to have been owned or controlled by private shippers and used by them for their own shipments only. In such a case there seems to be no question of public employment since there is no undertaking to serve people generally.[7]

Although not technically carriers, the conductors of such business, when upon a public basis, are usually in the public employment and engaged in a calling analogous to that of the common carrier; and statutory regulations[8] adopted for the control of common carriers often apply to them. This important fact must be borne in mind throughout the future discussion.

§ 96. Sleeping-car company not common carrier.

The sleeping-car company is not a carrier of passengers. It provides, to be sure, a vehicle for them to ride in, and accommodations for their comfort while riding; but the railroad company and not the car company undertakes and is responsible for the transportation, and has entire charge of the journey. If the journey is unduly delayed or interrupted, or the train meets with an accident whereby the passenger is injured, the fault is with the railroad company alone. It is accordingly almost universally held that a sleeping-car company is not a common carrier,[9] although in a public employment.

[7] See State v. Cincinnati, N. O. & T. P. Ry., 47 Ohio St. 130, 23 N. E. 928, 7 L. R. A. 319 (1890).

[8] These are discussed in Book III, *infra*.

[9] FEDERAL COURTS:

Blum v. Southern P. P. C. Co., 1 Flip. 500, Fed. Cas. No. 1,574 (1876); Lemon v. Pullman P. C. Co., 52 Fed. 262 (1892).

Therefore the sleeping-car company is not responsible for the act of a railroad company over which its cars are scheduled to run in failing to run trains,[10] or in unreasonable delay in running its trains;[11] nor is it liable for the wrongful expulsion of the passenger from the train by the servants of the railroad.[12]

§ 97. Forwarding agents not carriers.

A forwarding agent, who takes goods merely for the purpose of choosing a proper carrier and delivering the goods to him to

State Courts:

Alabama—Pullman P. C. Co. v. Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767 (1898).

Colorado—Pullman P. C. Co. v. Frendenstein, 3 Colo. App. 540, 34 Pac. 578 (1893).

Georgia—Pullman's P. C. Co. v. Hall, 106 Ga. 765, 32 S. E. 923, 71 Am. St. Rep. 293 (1899).

Illinois—Pullman P. C. Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258 (1874).

Indiana—Woodruff S. & P. Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102 (1882).

Kentucky—Pullman P. C. Co. v. Gaylord, 9 Ky. L. Rep. 58 (1887).

Massachusetts—Whitney v. Pullman P. C. Co., 143 Mass. 243, 9 N. E. 619 (1887); Dawley v. Wagner P. C. Co., 169 Mass. 315, 47 N. E. 1024 (1897).

Mississippi—In Mississippi a sleeping-car company is declared a common carrier by the constitution. Pullman P. C. Co. v. Lawrence, 74 Miss. 782, 22 So. 53 (1897).

Missouri—Scaling v. Pullman P. C. Co., 24 Mo. App. 29 (1886).

New York—Tracy v. Pullman P. C. Co., 67 How. Pr. (N. Y.) 154 (1884); Welding v. Wagner, 1 City Ct. Rep. (N. Y.) 66 (1878).

Pennsylvania—Pfaelzer v. Pullman P. C. Co., 4 W. N. C. (Pa.) 240 (1877); Pullman P. C. Co. v. Gardner, 3 Penny. (Pa.) 84, 14 W. N. C. 17 (1883).

Tennessee—Pullman P. C. Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70, 42 Am. St. Rep. 902, 21 L. R. A. 289 (1893).

Texas—The contrary is stated in Pullman P. C. Co. v. Pollock, 69 Tex. 120, 5 Am. St. Rep. 31 (1887).

[10] Simms v. Pullman S. C. Co., Fed. Cas. No. 12,869a (1878).

[11] Pfaelzer v. Pullman P. C. Co., 4 W. N. C. (Pa.) 240 (1877).

[12] Pullman P. C. Co. v. Lee, 49 Ill. App. 75 (1892); Lawrence v. Pullman P. Co., 141 Mass. 1, B. & W. 139 (1887).

carry, although a bailee, is not one who undertakes the transportation of the goods on his own account, and he is therefore not a carrier of the goods.[13] He differs in this respect from an express company[14] or a dispatch transportation company,[15] which though not personally carrying, still undertakes the carriage.

[13] Briggs v. Boston & A. R. R., 6 Allen, 246 (1863); Roberts v. Turner, 12 Johns. 232, 7 Am. Dec. 311 (1854); Brown v. Denison, 2 Wend. 593 (1829); Platt v. Hibbard, 7 Cow. (N. Y.) 497 (1827); Achley v. Kellogg, 8 Cow. (N. Y.) 223 (1828); Teall v. Sears, 9 Barb. (N. Y.) 317 (1850); Stannard v. Prince, 64 N. Y. 300 (1876).

[14] *Infra* 171.

[15] *Infra* 172.

CHAPTER IV.

PUBLIC PROFESSION OF THE COMMON CARRIER.

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§ 101. Nature of public profession.

The plainest justification for the imposition of the extraordinary law which requires those who are in public callings to serve all that apply at reasonable rates, is that in initiation the service is voluntary. People are not forced into public service against their wills; it is only when they have held themselves out in some way as ready to accommodate all that apply that they are bound to serve indiscriminately. Whether there has been such a general undertaking to serve the general public is the primary question on the establishment of public calling. But it is a question of fact rather than a question of law in most cases; and the discussion of it requires the statement of many cases involving many close issues of fact. For although the public profession is often enough made in express terms, as by the advertisement of a carrier; it is also not infrequently left to implication from the general course of business. So very often there is no other way of judging of the nature of the business.

TOPIC A—PUBLIC EMPLOYMENT.

§ 102. Public profession as an assumption of a public trust.

In the earlier cases of public employment the profession to serve all that appear was spoken of as the assumption of a public trust in undertaking the business or as granting to the public of an interest in that business. The original rule was clearly expressed over two centuries ago by Lord Holt:[1] "Wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him. . . . If, on the road a shoe falls off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king's subjects that will employ him in the way of his trade. If an innkeeper refuse to entertain a guest, where his house is not full, an action will lie against him; and so against a carrier, if his horses be not loaded and he refuses to take a packet proper to be sent by a carrier; and I have known such actions maintained, though the cases are not reported. . . . If the inn be full, or the carrier's horses loaded, the action will not be for such refusal; but one that has made profession of a public employment is bound to the utmost extent of that employment to serve the public."

§ 103. Express profession of public employment.

An advertisement that a person proposes to engage in the business of carrying is sufficient evidence that he is a common carrier, whether the advertisement is a sign on his office[2] or a

[1] Lane v. Cotton, 12 Mod. 472, 484 (1701).
[2] Ingate v. Christie, 3 Car. & K. 61 (1850).

notice in a newspaper.[3] And so the fact that a carrier has received a license to carry on business establishes his position as a common carrier, since the license is required only for public business.[4]

§ 104. By whom the profession must be made.

The public profession to carry must be made by the carrier himself, or some one expressly authorized by him to do it. Thus in a case where persons had been accepted as passengers on construction trains of an incomplete railroad by the person in charge of the work, the Supreme Court of Indiana well said:[5] "Allen was a superintendent of construction and a civil engineer, and it is not shown that he had authority to receive the appellee as a passenger upon a road that had never been opened to the travelling public. The board of directors and the established rules of the company alone could make the appellant a common carrier for hire and the appellee a passenger. The power was not delegated to Allen, and it was beyond the scope of his authority to convert a construction train into a passenger train. He could not open an imperfect and incomplete road into one for passenger traffic without the consent of his superior officers."

§ 105. Lighterman.

Such a case is that of the lighterman, as was decided in the leading case of Ingate v. Christie.[6] The defendant was employed

[3] Doty v. Strong, 1 Pinn. (Wis.) 313, 40 Am. Dec. 773 (1843).

[4] Babcock v. Herbert, 3 Ala. 392, 37 Am. Dec. 695 (1842); Farley v. Lavary, 107 Ky. 523, 54 S. W. 840, 47 L. R. A. 383 (1900); Atlantic City v. Brown, 71 N. J. L. 81, 58 Atl. 110 (1904); Robinson v. Cornish, 13 N. Y. Supp. 577 (1890); Culver v. Lester, 37 Can. L. J. 421 (1901); Gibson v. Silva, Rama-Nathan (Ceylon) 105 (circ. 1850).

[5] Evansville & R. R. R. v. Barnes, 137 Ind. 306, 36 N. E. 1092 (1894), by Dailey, J.

[6] 3 Car. & K. 61, B. & W. 7 (1850).

by the plaintiffs, who were merchants, to take 100 cases of figs in his lighter from Mills' Wharf, in Thames street, to the "Magnet" steamer, which lay in the river Thames, and then as the figs were on board the lighter, which was proceeding with them to the "Magnet," the lighter was run down by the "Menai" steamer and the figs all lost. It was proved that the defendant had a counting-house with his name and the word "lighterman" on the doorposts of it, and that he carried goods in his lighters from the wharves to the ships for anybody who employed him. Baron Alderson delivered the following opinion: "Everybody who undertakes to carry for any one who asks him, is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is matter of special contract. Here we have a person with a counting-house, 'lighterman' painted at his door, and he offers to carry for every one." [7]

TOPIC B—PRIVATE BUSINESS.

§ 106. Employment in private business.

When a person employs a vehicle to convey persons or property to or from his place of private business, such carriage is not common carriage, even if he incidentally allows other persons not having business with him to ride or carries as a matter of accommodation goods for other persons. But though the motive for establishing a route is to accommodate a certain business, if it offers to accommodate all persons who may find it useful, the case is one of public employment. "If all the people have the right to use the road, it is a public use or in-

[7] See to the same effect, Liver Alkali Co. v. Johnson, L. R. 9 Ex. 338 (1874); Boyers v. Moss, 18 Vict. L. R. 225 (1892).

terest, although the number who have business requiring its use may be very small." [1]

The distinction was forcibly put in the case of Ulmer v. Lime Rock Railroad: [2] "If the branch track is to be built solely and exclusively for the benefit and accommodation of the railroad company and of the owner of the private business enterprise, it may well be said that it would serve no public purpose and would be of no public use, although the existence of such a track might be of great, but indirect, benefit to the community, by enabling the private enterprise to be carried on, and in thereby giving employment to labor. But the mere fact that the primary purpose of such a branch is to accommodate a particular private business enterprise is by no means a controlling test. The character of the use, whether public or private, is determined by the extent of the right by the public to its use, and not by the extent to which that right is or may be exercised. If it is a public way in fact, it is not material that but few persons will enjoy it. When such a branch track is first constructed, and the right of way necessary therefor is taken, it may in fact be used only for the business of the plant to which it is constructed, because at that time no other business enterprise may exist in that vicinity to furnish freight for transportation; but in the future other enterprises may spring up, either upon the line or upon the extension thereof, so that a branch track which in the first instance is primarily constructed for the accommodation of one may become of equal accommodation, benefit and use to others."

§ 107. Private ferries.

So where a merely private ferry is established to convey persons to and from the premises of a private individual, who may

[1] Kettle River R. R. v. Eastern Ry., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111 (1889).

[2] 98 Me. 579, 57 Atl. 1001 (1904).

refuse to receive any person upon his premises, such a ferry is not carrying on a public employment. Such is a ferry established to convey persons to a picnic ground;[3] a wherry regularly conveying the laborers of its owner to their work;[4] and a skiff which is offered as a free conveyance to persons who will come to the store of its owner for trade;[5] or a ferry which conveys customers to his mill,[6] even if in the boat other persons are sometimes transported as a matter of accommodation, and give a gratuity to the servant managing the boat.[7] So, where several parties joined to maintain a boat for the purpose of conveying their cattle across a river to a slaughter-house the conveyance was not common carriage.[8]

§ 108. Private railroad.

In the same way, a railroad constructed and used merely in connection with the conduct of a private business is not a common carrier. So, where a railroad is built to haul logs from the forest to the saw-mill of the owner, it is not a common carrier.[9] It cannot be seriously contended, said the Circuit Court of Appeals, that an article of the State Constitution which dealt with corporations of public improvement and utility, "was intended to, or could be so construed as to, make out of a logging railroad appurtenant to a saw-mill, constructed wholly on private grounds, and operated for private purposes, a common carrier charged with all the duties and responsibilities incumbent by the laws of the land upon common carriers, and simply because

3 People v. Mago, 69 Hun (N. Y.) 559, 23 N. Y. Supp. 938 (1893).
4 Tadhunter v. Buckley, 7 L. T. N. S. 273 (1862).
5 Shinn v. Cotton, 52 Ark. 90 (1889).
6 Self v. Dunn, 42 Ga. 528, 5 Am. Rep. 544 (1871).
7 Littlejohn v. Jones, 2 McMull (S. C.), 366, 39 Am. Dec. 132 (1842).
8 Flautt v. Lashley, 36 La. Ann. 106 (1884).
9 White v. Kennon, 83 Ga. 343, 9 S. E. 1082 (1889); Wade v. Lutcher & M. C. Lumber Co., 74 Fed. 517 (1896); Nicolette Lumber Co. v. People's Coal Co., 26 Pa. Supr. Ct. 575 (1904).

it is a railroad, and the owners are incorporated as a business corporation. It seems to us, we might as well hold that a railroad on a sugar plantation, appurtenant to the sugar-mill, and used for carrying cane thereto, should be declared a common carrier." [10]

So in a Louisiana case it was held that a corporation organized to carry freight and passengers between two sugar plantations about five miles distant from one another, and which, it was charged, was not a corporation organized for public purposes, but was a combination of individuals, whose sole object was to foster the private ends of two certain persons named, who owned jointly two sugar plantations, and who wished to transport the sugar cane grown on one of the plantations to the refinery situated on the other, was not, *ex necessitate,* such a corporation for public improvement as would authorize the expropriation of private property for its purposes.[11] And a railroad used in transporting property within a private stock-yard is not a common carrier.[12]

§ 109. Private spur tracks.

A strictly private spur track leading from private property to the line of a public railroad, over which the public can have no rights is not a common carrier. So in an Illinois case it appeared that a coal company had a tramway running from one portion of its coal field to another; and it desired to condemn by right of eminent domain a strip of private land in order to connect the tramway with a railroad. The court held that this could not be done. In the course of his opinion Mr. Justice Mulkey said: "It is clear that the use for which the land is

[10] Pardee, Circ. J., in Wade v. Lutcher & M. C. Lumber Co., 74 Fed. 517, 521, 20 C. C. A. 515, 41 U. S. App. 45 (1896).

[11] Williams v. Judge of Eighteenth Judicial Dist. Ct., 45 La. Ann. 1295, 14 So. 57 (1893).

[12] Swift v. Ronan, 103 Ill. App. 475 (1902).

proposed to be taken in this case is not a public one. The coal, the coal works and the present tramway are in the strictest sense private property, and the public generally have no more interest in them or in the operation of the works including the tramway than they have in any other strictly private business. The same would be equally true after the proposed extension of the tramway. The extending of it to the railroad would not change its character or the obligations of the company or the public in the slightest degree. Without the consent of the owners of it, there is not a person in the State, outside of themselves, who would have the right to ride upon it on any terms that might be proposed, or to have carried upon it a single pound of freight." [13]

It is immaterial whether such a spur track is to be constructed by the private owner or by the railroad to which access is desired. So a petition by a railroad company to condemn land for such a track was refused,[14] the court saying: "Stripped of all the disguises thrown around the case of the petitioner, it is shown that its object is to condemn the land of the defendants for the purpose of enabling it to lay a siding, switch, branch road, or lateral work from the main track to the Wheeling Steel Works, a few hundred feet distant, for the purpose, as stated in the original petition, 'of transporting freights to and from said steel works over the petitioner's said railroad.' This clearly was for the private accommodation of both the railroad and steel works, and to make the private business of both more profitable. This was not for a public, but was for a private use, and the taking of the property, under these circumstances, would be the taking of private property for private use, which is clearly prohibited."

[13] Sholl v. German Coal Co., 118 Ill. 427, 10 N. E. 199 (1886).

[14] Pittsburg W. & K. R. R. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680 (1888).

§ 110. Lateral branches.

When the railroad itself builds a branch line from its road, primarily to accommodate some individual business, it is nevertheless a common carrier over the branch, and the use of the track is open to all who have occasion to use it as well as to the particular individual for whose benefit it was built.[15] The question is usually raised by a petition to take land for this purpose by eminent domain. This is universally decided to be permissible, for the operation of such a branch is a public use.[16] As the court said in Chicago & Northwestern Railway v. Morehouse:[17] "The taking of land for a spur track to connect with a single industry is a taking for public use, if the purpose of the company is to maintain and operate such track as an integral part of its railway system, so as to serve all who may desire it, and all can demand, as a right, to be served without discrimination."[18]

[15] Bulter v. Tifton, T. & G. R. R., 121 Ga. 817, 49 S. E. 763 (1905); Louisville & Nashville R. R. Co. v. Pittsburgh & K. Coal Co., 23 Ky. Law Rep. 1318, 64 S. W. 969, 55 L. R. A. 601 (1901); Kellogg v. Sowerby, 87 N. Y. Supp. 412 (1904); Railroad Comm'rs v. St. Louis & S. W. Ry. (Tex.), 80 S. W. 102 (1904).

[16] St. Louis, I. M. & S. Ry. v. Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434 (1893); Ulmer v. Lime Rock R. R., 98 Me. 579, 57 Atl. 1001 (1904); Toledo S. & M. R. R. v. East S. & S. C. R. R., 72 Mich. 206, 40 N. W. 436 (1888); Butte A. & P. Ry. v. Montana U. Ry., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298 (1895); De Camp v. Hibernia R. R., 47 N. J. L. 43 (1885); Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 46 Pac. 790, 60 Am. St. Rep. 818, 334 L. R. A. 368 (1896); Chicago & N. W. Ry. v. Morehouse, 112 Wis. 1, 87 N. W. 849, 88 Am. St. Rep. 918, 56 L. R. A 240 (1901).

[17] *Supra.*

[18] In a Texas case where the right to condemn land for a lateral branch running to several private places of business was refused; the reason seems to have been that the charter of the railroad limited it to a certain route, and the desired branch was off the route. Kyle v. Texas & N. O. R. R. (Tex. Civ. App.), 4 L. R. A. 275 (1889).

§ 111. Public spur tracks.

It sometimes happens that a spur track is constructed by an individual from his premises to the railroad, but under such circumstances that the use of it is extended to the public. Such a spur track is a public track, and the operator (whether the individual or the railroad) is a common carrier as to the track.[19] As the court said in the case of Chicago Dock & Canal Company v. Garrity:[20] "We have not regarded the circumstances that they were laid with private funds, and that they terminated opposite or within convenient contiguity of a private manufacturing establishment, as materially affecting them and giving a private character to their use. All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this. If they are open to the public use indiscriminately, and under the public control to the extent that railroad tracks generally are, they are tracks for public use. It may be in such cases that it is expected or even that it is intended that such tracks will be used almost entirely by the manufacturing establishment, yet, if there is no exclusion of an equal right of use by others, and this singleness of use is simply the result of location and convenience of access, it cannot affect the question."

§ 112. Industrial railways.

An added importance has accrued to this subject because of the recent invention of a kind of railway known as the "industrial" railway. This is a short line of railway, owned by an industrial corporation or by the owners of some business enterprise, and connecting the factory or the place of business with the main line of some railway. It may amount to no more than

[19] Agee & Co. v. Louisville & N. Ry. (Ala.), 37 So. 680 (1905); Chicago D. & C. Co. v. Garrity, 115 Ill. 155, 3 N. E. 448 (1885); Phillips v. Watson, 63 Iowa, 28, 18 N. W. 659 (1884).

[20] *Supra.*

a short spur track; but it is organized as an independent railway corporation, and the owners of the industrial enterprise are its stockholders.

If such a road, however short it may be, is actually operated independently with its own locomotives and cars, it would seem to be an independent carrier, though it is operated for the exclusive benefit of the industrial enterprise which owns it; and this is certainly the case where it accepts such general traffic along its line as may be offered to it. Of such a railway the Interstate Commerce Commission said, by Mr. Commissioner Prouty: "The Illinois Northern Railroad is a common carrier within the first section of the act to regulate commerce. It is incorporated as a railroad company under the laws of Illinois. It actually owns and operates a line of railroad. It maintains a freight station, at which it receives and delivers for the general public considerable quantities of less than carload freight. Its main business is the moving of loaded cars to and from various industries along its line, and in this capacity it serves more than two hundred plants, besides that of the International Harvester Company. Manifestly there is no reason in law why this railroad may not make joint rates, file joint tariffs and agree upon joint divisions as other railroads do. We are not called upon to decide what the situation might be if this road were a private carrier maintaining switch tracks and switching cars to and from the McCormick works exclusively. The mere fact that this road is to-day entirely owned by the largest individual shipper over it, or that it was originally organized and built for the purpose of doing the work of that shipper, is not, in our opinion, controlling against the legality of the transaction before us." [21]

[21] *Re* Divisions of Joint Rates, 10 I. C. C. Rep. 385 (1904).

§ 113. Tap lines.

But if the "industrial railway" is simply a "tap line," not a common carrier operating a service over its rails for all that apply, it cannot pose as an independent carrier and demand the right to enter into pro rating arrangements with succeeding carriers.

The question, whether allowances from the published rate made by the roads west of the Mississippi to logging roads or "tap lines," as they are called, owned or controlled by the lumber mills, constituted departures from published rates in violation of the Act to regulate commerce, was presented for decision by the Interstate Commerce Commission in the case of The Central Yellow Pine Association v. The Vicksburg, Shreveport & Pacific Railroad,[22] and it was held, that the published rate must be strictly observed; that the defendants were not authorized under the law "to grant a division of the rate to the owner of a lumber mill as compensation to him for the cost of bringing his logs to the mill by steam railroad, horse railroad, wagon, or any other means of conveyance;" and that a common carrier subject to the provisions of the Act to regulate commerce can "allow a division of rates *only to another* common carrier which, participating in the particular traffic to which the rate is applied, *is also subject to those provisions.*"[23]

§ 114. Distinction between public lateral branch and private spur.

The distinction between the public branch and the private spur appears to lie merely in the facts as to the use which can be made of the road. If it runs for a considerable distance, so that at a future time demands not now in existence may come into being and the road may be of use to a number of persons,

[22] 10 I. C. C. Rep. 193 (1904).

[23] Compare *Re* Transportation of Salt, 10 I. C. C. Rep. 1 (1904) (holding the tap line not a common carrier where it had no equipment).

it is a public road. If, however, the premises of the individual benefited either directly adjoin the railroad or are separated only by a few feet, so that the intervening land can be accommodated from the main track, then the use is a private one; and that was the fact in the cases previously examined of private spurs. The true doctrine is admirably stated by the court in the case of Butte, Anaconda & Pacific Railway v. Montana Union Railway:[24] "Frequently railroads are extended by spurs or lateral connections of main lines, or by independent lines, into mining camps where but a single mine is developed and capable of shipping freight. Such roads or spurs are not infrequently built by the private enterprise of those interested in the one mine to be benefited, and when constructed it is intended that the tracks will be used almost wholly by the mining company which constructed the spur. The supposed barrenness of the country contiguous to the road, or the undeveloped condition of the mountain in which the mine is lying, or, perhaps, the hitherto unrewarded search of the prospector, has encouraged the belief that, apart from the single mine owned by those who have built the railroad, there are no other paying properties upon which a railroad might rely for ores or supplies to transport. Such expected limited uses are but the results of the location of the mine and its inaccessibility. They do not in any way, however, exclude an equal right of use by others, perchance, desiring to ship freight or secure transportation over the road. To better illustrate our meaning, we have only to modify the instance just referred to of the lateral railroad built to a single mine. Suppose that a pioneer prospector has located and represented a claim contiguous to such railroad, but by reason of the impracticability or expense of constructing a wagon road, he has been obliged to simply keep what he believed was a good mine, hoping that in the future railroad facilities would afford

[24] 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298 (1895); See Avenger v. So. Carolina R. R., 29 S. C. 265 (1888).

him the opportunity to haul his ore to market. Suddenly, by the enterprise of others, and without any expectation on their part of aiding any project other than their own, a railroad is built, and he may attain the fruition of his hopes if he can use the railroad to ship his ore. Could it be contended with any merit that the railroad company, incorporated under the railroad laws of the State, can discriminate against him by saying, 'We are a private enterprise, for private use, and are not generally open to the public, and for this reason refuse to haul your ore, or to bring your machinery and supplies into these hills, and you cannot compel us to act otherwise?'"

TOPIC C—CASUAL EMPLOYMENT.

§ 115. Intermittent employment.

Where the employment is casual only, and not a regular matter of business, the carrier is not a *common* carrier.[1] So where a manufacturer who purchased a machine contracted with the seller to cart it, and the machine was injured, without negligence, while it was being carried, the manufacturer was held not to be a common carrier.[2]

In a case in Ceylon[3] the owner of a wagon was complained of because he had not secured the license required of a common carrier. He had contracted to use his wagon in doing a particular job; and this was held not to make him a common carrier. Mr. Chief Justice Oliphant remarked that "obviously every one hiring out his cart for a job, as to bring a load of bricks or to remove earth from the foundations of a house, would not be obliged to get a license." So the owner of a boat propelled by oars and rowed for hire across a river from time to

1 Fuller v. Bradley, 25 Pa. St. 120 (1855).

2 Allis v. Voight, 90 Mich. 125, 51 N. W. 190 (1892). See to the same effect Benedict v. Arthur, 6 Up. Can. Q. B. N. S. 204 (1849); Samms v. Stewart, 20 Ohio, 270, 55 Am. Dec. 445 (1851)

3 Gibson v. Silva, Rama-Nathan, 105 (circ. 1850).

time by employes usually occupied in other ways is not a common carrier.[4]

§ 116. Shipmaster.

This principle is well illustrated by cases of carriage on vessels. If the vessel is casually employed to carry, it is not a common carrier.[5]

A leading case on this point is Allen v. Sackrider.[6] The facts in that case were that "the defendants were the owners of the sloop Creole, of which Farnham was master. In the fall of 1859 the plaintiffs applied to the defendants to bring a load of grain from the bay of Quinte to Ogdensburgh. The master stated that he was a stranger to the bay, and did not know whether his sloop had capacity to go there. Being assured by the plaintiffs that she had, he engaged for the trip at three cents per bushel, and performed it with safety. In November, 1859, plaintiffs again applied to defendants to make another similar trip for grain, and it was agreed at one hundred dollars for the trip. The vessel proceeded to the bay, took in a load of grain, and on her return was driven on shore, and the cargo injured to the amount of $1,346.34; the injury did not result from the want of ordinary care, skill, or foresight, nor was it the result of inevitable accident, or what, in law, is termed the act of God." Mr. Justice Parker said: "The only question in the case is, were the defendants common carriers? The facts found by the referee do not, I think, make the defendants common carriers. They owned a sloop; but it does not appear that it was ever offered to the public or to individuals for use, or ever

[4] Roussel v. Aumais, Rap. Jud. Quebec, 18 C. S. 474 (1900).

[5] Pennewill v. Cullen, 5 Harr. (Del.) 238 (1849); Aymar v. Astor, 6 Cow. (N. Y.) 266 (1826); Fish v. Clark, 49 N. Y. 122 (1872). See, however, *contra*, Moss v. Bettes, 4 Heisk. (Tenn.) 661, 13 Am. Rep. 1 (1871), which holds that one who carries for hire on the river is a common carrier. The doctrine of the case is limited to water carriers.

[6] 37 N. Y. 341, B. & W. 5 (1867).

put to any use, except in the two trips which it made for the plaintiffs, at their special request. Nor does it appear that the defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers, or had ever offered their services as such. This casual use of their sloop in transporting plaintiffs' property falls short of proof sufficient to show them common carriers."

Where a vessel is chartered by the owner, the charter being necessarily an isolated transaction, the owner does not thereby become a common carrier.[7] If, on the other hand, the vessel in question is in the general freighting business, plying regularly between two ports and carrying freight, she is obviously carrying not casually but as a regular business, and the person who conducts the business is a common carrier.[8]

§ 117. Railroad not opened for passengers.

Where a railroad is under construction and is not yet publicly opened for passengers, it is not a common carrier of passengers; and this is true though persons have occasionally been carried over the road in construction trains at their own solicitation.[9] Thus in McRae v. Canada

[7] Lamb v. Parkman, 1 Sprague, 343 (1857); Sumner v. Caswell, 20 Fed. 249 (1884); The Dan, 40 Fed. 691 (1889).

[8] Richardson v. Sewell, 2 Smith (Eng.) 205 (1805); Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788 (1888); The Huntress, 2 Ware, 89 (1840); Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745 (1838); Bennett v. Filyaul, 1 Fla. 403 (1847); Brown v. Clayton, 12 Ga. 564 (1853); Mersbon v. Hobensack, 22 N. J. L. 372 (1850); Elliott v. Rossell, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306 (1813); Swindler v. Hilliard, 2 Rich. L. (S. C.) 286, 45 Am. Dec. 732 (1846); Porterfield v. Humphrey, 8 Humph. (Tenn.) 497 (1847); Spencer v. Daggell, 2 Vt. 92 (1829).

[9] Shoemaker v. Kingsbury, 12 Wall. (U. S.) 369, 20 L. Ed. 432 (1871); Wade v. Lutcher, etc., Cypress Lumber Co., 74 Fed. 517, 41 U. S. App. 45, 20 C. C. A. 515 (1896); Albion Lumber Co. v. De Nobra, 72 Fed. 739, 44 U. S. App. 347, 19 C. C. A. 168 (1896); Menaugh v. Bedford Belt R. Co., 157 Ind. 20, 60 N. E. 694 (1901); Evansville & R. R. R. Co. v. Barnes, 137 Ind. 306, 36 N. E. 1092 (1894); Nashville, etc., R.

Pacific Railway,[10] Mr. Justice Johnson, charging the jury, said: "A railway which occasionally carries goods or freight in passenger trains is not a common carrier of goods on such trains; and the same rule applies to a railway which occasionally carries passengers in its freight or construction trains, though when persons got on to ride, the defendants did not put them off. If you find the defendants did not solicit passengers, or publicly announce they would be carried, even, if in some or many instances, they have carried passengers for hire at the request and for the special accommodation of applicants, it is clear you have no right to impose upon the defendants the severe obligations which attach to common carriers." Where, however, notwithstanding the road has not been completed the railroad has made a practice of receiving for hire goods and passengers for carriage on its construction trains, it will be held to be a common carrier.[11]

So in Nashville and Chattanooga Railroad v. Messino,[12] where the facts were that a temporary track was laid over a hill while a cut was being dug through. The road was not opened, and the track was only used for the transport of materials and workmen. Neighbors, however, were allowed to ride, at first free, and presently, to diminish the number of those who rode, a fare was imposed. The railroad company did not, in terms, hold themselves out to carry passengers except on Sunday. Those who rode sat on the open cars, but the plaintiff, the morning being damp, rode in the box car, though one of the employes suggested that there were seats on the open car. It was

Co. v. Messino, 1 Sneed (Tenn.), 220 (1853). See San Antonio & A. P. Ry. v. Robinson (Tex.), 15 S. W. 584 (1891); Sheerman v. Toronto, etc., R. Co., 34 U. C. Q. B. 451 (1874); Graham v. Toronto, etc., R. Co., 23 U. C. C. P. 541 (1874); McCrae v. Canada Pacific R. R., Montreal L. R. 4 S. C. 186 (1888).

[10] *Supra.*

[11] Little Rock M. R. & T. Ry. v. Glidewell, 39 Ark. 487 (1882).

[12] 1 Sneed (Tenn.), 220 (1853).

held that the railroad company were liable, as common carriers, for an injury to plaintiff, under a verdict to that effect.

§ 118. Incidental employment—Wagoner.

It sometimes happens, especially in a new country, that a farmer or other person who is driving a wagon to town on his own business may agree to carry goods for his neighbors for hire. Where he consents to carry for all persons indifferently, the prevailing view is that he becomes a common carrier, at least as to the particular trip in connection with which he makes the offer, though he might not be compelled to undertake the duty on any other occasion. In the earliest case the plaintiff claimed exemption from distress upon his goods upon the ground that they were in the possession of a common carrier. The plaintiff had delivered them in London to one Richardson to carry, who "was not a common carrier, but for some small time last past, brought cheese to London, and in his return took such goods as he could carry back in his wagon into the country for a reasonable price;" and the goods were distrained in his possession by his landlord. The court held the goods exempt, for the reason that "any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is, as to this privilege, a common carrier." [13]

The case does not distinctly decide that the carrier was a common carrier; indeed, the literal language of the court seems to imply the opposite. And in at least one case it has been held that in such a case the farmer is not a common carrier, nor, the court added, would it "make any difference how many applications of this kind had been made by the party thus carrying, or to how many different persons they may have been made, they would still remain so many special and individual transactions." [14] The view usually taken, however, is that the farmer

[13] Gisbourn v. Hurst, 1 Salk. 249, B. & W. 2 (1710).
[14] Samms v. Stewart, 20 Ohio, 69, 55 Am. Dec. 445 (1851)

under such circumstances is a common carrier, in spite of the fact that this occupation is merely incidental.[15]

It seems clear that there is nothing in the fact that the carrier is engaged in another business to prevent him from being also engaged in the business of common carrier; nor is there any reason why his business of carriage should not be merely incidental to his other business, provided the carriage is really a business and not a mere casual occupation. And in Gordon v. Hutchinson,[16] Mr. Chief Justice Gibson said: "I am unable to understand why a wagoner soliciting the employment of a common carrier, shall be prevented, by the nature of any other employment he may sometimes follow, from contracting the responsibility of one. What has a merchant to do with the private business of those who publicly solicit employment from him? They offer themselves to him as competent to perform the service required, and, in the absence of express reservation, they contract to perform it on the usual terms, and under the usual responsibility."

§ 119. Truckman.

The case of the truckman also well illustrates the general principle; for even though he is a public truckman he must make a special bargain with each person who employs him. Even where a truckman is professing publicly the business of carrying goods from one part of a town to another, a few authorities have held that he is not a common carrier.[17] The

[15] Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393 (1847); Harrison v. Roy, 39 Miss. 396 (1860); Gordon v. Hutchinson, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464, B. & W. 3 (1841); Chevallier v. Strahan, 2 Tex. 115, 47 Am. Dec. 639n (1849). In Haynie v. Baylor, 18 Tex. 498 (1857), it was held a question for the jury in such case whether the defendant solicited goods and so was common carrier, or took at request of plaintiff and was not.

[16] 1 W. & S. (Pa.) 285, 37 Am. Dec. 464, B. & W. 3 (1841).

[17] Brind v. Dale, 8 C. & P. 207 (1837); Scaife v. Farrant, L. R. 10 Ex. 358 (1875); Faucher v. Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431 (1895); Jauniet v. American S. & M. Co. (Mo. App.), 84 S. W. 128 (1904).

reason for these decisions was expressed by Mr. Justice Denman in Scaife v. Farrant:[18] "The defendant did not so deal with the public as to undertake to carry goods in the absence of an agreement as to terms of carriage; . . . not that he will carry at all events, but only that he will carry if his estimates and terms, whether as to liability or otherwise, are agreed to."

Other authorities, however, hold that the truckman who holds himself out as a public truckman is a common carrier, even though it is impossible for him to fix in advance a tariff of charges, and he must therefore make a separate agreement as to his charges in each case.[19] So a person who makes a public business of transporting goods from place to place in a town on a sled drawn by an ox-team has been held to be a common carrier.[20]

TOPIC D—SPECIAL ARRANGEMENTS AS TO THE CARRIAGE.

§ 120. Whether the transaction is upon a public or private basis.

It has just been seen that unless there has been some public profession to perform a certain public service there is no duty to undertake that service. But suppose that one engaged in public employment does undertake to serve a particular applicant in a way not exactly within the obligation or to an extent beyond the usual limits of the service, is the result that the relation is that of a private party to a private contract or is the relation that of one in public employment to one of the

[18] L. R. 10 Ex. 358, 364 (1875).

[19] Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393 (1847); Robertson v. Kennedy, 2 Dana (Ky.), 430, 26 Am. Dec. 466 (1834); Cayo v. Pool, 21 Ky. L. Rep. 1600, 55 S. W. 887, 49 L. R. A. 251 (1900); Farley v. Lavary, 21 Ky. L. Rep. 1252, 54 S. W. 840, 47 L. R. A. 383 (1900); Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432 (1899); Robinson v. Cornish, 13 N. Y. Suppl. 577 (1890); Culver v. Lester, 37 Can. L. J. 421 (1901).

[20] Robertson v. Kennedy, *supra*.

public? This issue requires discussion, for the phases of this problem are various and some discriminations must be made in order to state the law governing such special arrangements within the public service.

§ 121. Special train.

A railroad may run a special train, not intended for passengers, in which no one can claim to be carried as a passenger as of right. In a case in Georgia[1] it appeared that there had been a wreck on a branch of the defendant's road, several miles from the town of Washington, by reason of which regular traffic on that branch had been suspended. An engine and freight car were run from Washington to the scene of the wreck, and the plaintiffs and others requested permission of the conductor in charge of the train to ride thereon, which was granted. The plaintiffs offered to pay the conductor for the round trip, but he would accept fare only one way. He had previously told the plaintiffs that he would probably return to Washington in about an hour. This was about 7 o'clock in the evening. The train, however, did not leave the scene of the wreck until about midnight, and, when it did, the conductor, acting under instructions from the superintendent of the railroad, refused to transport the plaintiffs, who walked back to Washington, and brought suit for the refusal. The court held that the action would not lie. Mr. Justice Candler said: "The train upon which the plaintiffs rode from Washington to the scene of the wreck was in no sense a regular passenger train. Indeed, it was neither regular nor passenger. Its sole purpose was to meet an emergency with which the employes of the defendant were confronted. This fact was well known to the plaintiffs. The defendant was under no obligation to transport them on this train at all. There is nothing in the evidence to show

[1] Louisville & N. R. R. v. Du Bose, 120 Ga. 339, 47 S. E. 917 (1904).

that they were on the train by the invitation of the conductor. On the contrary, they sought him out, and requested him to allow them to ride on the train; demonstrating that they recognized that he was under no obligation to do so. Nor can it be successfully contended that the defendant is liable to the plaintiffs for the violation of the verbal contract alleged to have been made with them by the conductor to allow them to return on the train when it should come back to Washington. It is true, as a general proposition, that a person on a train may rely on the undertakings of the conductor, within his implied authority; but in the present case the plaintiffs were well aware that an emergency existed which had deranged all regular business on this branch of the defendant's road, and which was liable to upset any plans that might be made by the conductor with reference to the running of this train. When they boarded the train, they took the chances of the happening of such a contingency."

§ 122. Special freight trains.

Where cars loaded with freight are to be hauled in a special train at special times, not on the regular schedule, and by a special arrangement, the railroad company in so hauling the cars is not a common carrier. This arrangement is commonly made between the owner of a circus and the railroad which transmits the establishment from one place of exhibition to another. The circus is transmitted in a special train, made up exclusively of the circus cars, on a special schedule of time, and for a price less than the regular rates; and the owner furnishes men to load and unload. For such transportation the railroad is not responsible as a common carrier.[2]

[2] Chicago, M. & S. P. R. R. v. Wallace, 66 Fed. 506, 30 L. R. A. 161 (1895); Wilson v. Atlantic C. L. R. R., 129 Fed. 774 (1904); Robertson v. Old Colony R. R., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482 (1892); Coup v. Wabash, S. L. & P. Ry., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374, B. & W. 12 (1885).

In the leading case on the subject,[3] Mr. Justice Campbell said: "The business of common carrier, while it prevents any right to refuse the carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier, and running on their own time. It is never the duty of a carrier, as such, to make up special trains on demand, or to drive such trains made up entirely by other persons, or by their cars. It is not important now to consider how far, except as to the owners of goods in the cars forwarded, the reception of cars, loaded or unloaded, involves the responsibility of carriers as to the owners of the cars as such. The duty to receive cars of other persons, when existing, is usually fixed by the railroad laws, and not by the common law. But it is not incumbent on companies, in their duty as common carriers, to move such cars, except in their own routine. They are not obliged to accept and run them at all times and seasons, and not in the ordinary course of business. The contract before us involves very few things ordinarily undertaken by carriers. The trains were to be made up entirely of cars which belonged to plaintiff, and which the defendant neither loaded nor prepared, and into the arrangement of which, and the stowing and placing of their contents, defendant had no power to meddle. The cars contained horses which were entirely under control of plaintiff, and which, under any circumstances, may involve special risks. They contained an elephant, which might very easily involve difficulty, especially in case of accident. They contained wild animals, which defendant's men could not handle, and which might also become troublesome and dangerous. It has always been held that it is not incumbent on carriers to assume the burden and risks of such carriage. The trains were not to be run at the option of the defendant, but had short routes and special stoppages, and were to be run on some part of the road chiefly during the night.

[3] Coup v. Wabash, S. L. & P. Ry., *supra*.

They were to wait over for exhibitions, and the times were fixed with reference to these exhibitions, and not to suit the defendant's convenience. There was also a divided authority, so that, while defendant's men were to attend to the moving of the trains, they had nothing to do with loading and unloading cars, and had no right of access or regulation in the cars themselves. It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions, and, if he could not, then he could only do so on such terms as defendant saw fit to accept. It was perfectly legal and proper, for the greatly reduced price, and with the risks and trouble arising out of moving peculiar cars and peculiar contents on special excursions and stoppages, to stipulate for exemption from responsibility for consequences which might follow from carelessness of their servants while in this special employment. How far, in the absence of contract, they would be liable in such a mixed employment, where plaintiff's men as well as their own had duties to perform connected with the movement and arrangement of the business, we need not consider."

§ 123. Private excursion trains.

When a railroad company hires a train to a private individual or association to use as an excursion train, the railroad in running the train is not strictly a common carrier, and cannot be compelled to carry any person on the train who is not invited by the lessee.[4] "The railroad company, having provided for meeting the reasonable demands of the public for the carriage of passengers, is at liberty to employ its trains in its own way, with the proviso that these trains must, as a matter of public policy, be operated and run by its own qualified servants, for the protection and safety of life and property."[5] Neverthe-

[4] Moore v. St. Louis, I. M. & S. Ry., 67 Ark. 389, 55 S. W. 161 (1900).

[5] Bunn, C. J., in his dissenting opinion in Moore v. St. Louis, I. M. & S. Ry., *supra*.

less the railroad is under the same duty toward any person invited by the lessee, or to whom the latter sells a ticket, that it is under to any passenger. It is therefore liable to one who having been allowed by the lessee to buy a ticket is then refused by him permission to ride,[6] or is assaulted or insulted by other excursionists,[7] or is negligently injured by an accident to the train.[8]

§ 124. Establishment of train on guaranty of an individual.

If a regular train is established upon the guaranty by an individual of the expense of maintaining it, the railroad is none the less a common carrier in running the train, and it cannot give the guarantor an advantage over his business rivals. This question was raised and elaborately discussed in the case of Memphis News Publishing Company v. Southern Railway.[9] In that case it appeared that a railroad company contracted with a newspaper publisher, agreeing to run a special early morning train carrying only the newspapers of the publisher, in consideration of the publishing company guarantying to it a certain revenue from the operation of the train. This train became one of its scheduled trains, and was advertised as such. It was controlled exclusively by the company, and all the revenue derived from its operation in the carrying of passengers and freight was its property. It was held that the railroad could not, relying on its contract, refuse to carry on such train newspapers tendered it by a rival publishing house, which offered to comply with all the conditions as to guaranty, indemnity, etc., complied with by the house making the contract, and the fact that the publishing company solicited the institution

[6] Moore v. St. Louis, I. M. & S. Ry., *supra*.

[7] Texarkana & F. S. Ry. v. Anderson, 67 Ark. 123, 53 S. W. 673 (1899); White v. Norfolk & S. R. R., 115 N. C. 631, 20 S. E. 191 (1894); Collins v. Texas & P. Ry., 15 Tex. Civ. App. 169, 39 S. W. 643 (1897).

[8] Skinner v. London, B. & L. C. Ry., 5 Ex. 787 (1850).

[9] 110 Tenn. 684, 75 S. W. 941 (1903).

of the train service and supported it by a large outlay of money during its early days did not change the rule, nor make the train a special one, chartered for a special purpose. In delivering the opinion of the court Mr. Chief Justice Beard said: "If the contract complained of in this case was one which granted an exclusive right and privilege to the Commercial Publishing Company to sell its newspapers on this train, and the complainant was here seeking to interfere with this contract and to force the railroad to grant it an equal privilege, then there would be presented a special agreement which the courts would not intermeddle with; and this upon the ground that as a common carrier it owed no duty to furnish newspapers to the traveling public, and was not bound to permit another to do so. If it chose, however, to grant this privilege, another to whom it was refused would not be heard to complain.

"But this is not the case at bar. Under the contract the railway company is carrying the newspapers of the Commercial Publishing Company as property, and the complainant is insisting that, having the means of doing so, it should equally and impartially carry its packages of papers upon the same terms as merchandise. It would hardly be contended that a railroad by making a special and exclusive contract to transport shoes manufactured by one party in a community, could strip itself of its common-law character, and decline, without any reason save the existence of said contract, to transport boxes of shoes for another manufacturer in the same community. If this be so, where is the controlling difference between such a case and the one now before us? Packages of newspapers are as much property as shoes, and the principle which controls in the one case, it seems to us, must equally apply to the other. If this be not so, by parceling out its means of transportation to the full extent of its carrying capacity, it would be possible for a railroad to build up a few in a community to the destruction of the many who equally seek shipment. This the law

will not tolerate in one who holds himself out as a common carrier. As has been already said, he must accord equal privileges to all who are in like condition. He cannot foster monopolies. He will not, by making special preferential agreements, be permitted to build up one set of shippers at the expense of another. He must carry for all alike.

"These general principles being established, what is there to prevent their application in this case? We see nothing. A railroad by its very nature, as has been seen, is a common carrier. The train in question is a scheduled one, advertised to the world as such. An invitation is given to the public to take passage and ship freight upon it. Its own employes, managers, and the railway company appropriate all its revenues. So far as the record shows, it receives on this train merchandise from every other member of the community, and refuses carriage alone to that of this complainant; and this refusal is based, not upon a lack of carrying capacity, but exclusively upon the ground that it has contracted away its duty, in respect to such property as the complainant has tendered, to another party. Such an excuse cannot relieve the railway company from its obligations to complainant as one of the public."

TOPIC E—EXTENT OF THE PUBLIC PROFESSION.

§ 125. To what goods the profession to carry extends.

A common carrier does not by professing the public employment of carriage thereby undertake to carry any kind of property or person. His employment extends only as far as his profession; he is not bound to carry every description of goods, but only such as he has publicly professed to do. "A person may profess to carry a particular description of goods only in which case he could not be compelled to carry any other kind of goods."[1] It has accordingly been held that a railroad which

[1] Parke, B., in Johnson v. Midland Ry., 4 Ex. 367, 373 (1849).

has not professed to do so cannot be compelled to carry coal,[2] or cedar lumber, after public announcement has been made that no more will be accepted.[3] Apparently lumber of any other kind was carried. An express company, it has been held, can be forced to carry fish only if it is shown that it has made a profession of carrying fish.[4] And a railroad carrying mail is not a common carrier so as to be liable as an insurer; but is liable only for negligence as a bailee.[5] Upon these principles it is held that a railroad company not having professed to do so cannot be compelled to carry dogs on passenger trains.[6]

§ 126. Money.

An ordinary carrier of goods is not necessarily a common carrier of money,[7] but if the carrier is in the habit of carrying money, or makes any profession of carrying it, he will be held as a common carrier of it.[8] The fact that the railroad carries

[2] Johnson v. Midland Ry., 4 Ex. 367 (1849).

[3] Rutherford v. Grand Trunk Ry., 5 Rev. Leg. (Can.) 483 (1873).

[4] Leonard v. American Exp. Co., 26 Up. Can. Q. B. 533 (1867).

[5] Central Railroad & Banking Co. v. Lampley, 76 Ala. 357 (1884); Boston Ins. Co. v. Chicago, etc., R. R. Co. (Iowa), 92 N. W. 88 (1902); Bankers' Mutual Casualty Co. v. Minneapolis, etc., R. Co., 117 Fed. 434 (1902) (approving 113 Fed. 414 [1901]).

[6] Lee v. Burgess, 9 Bush (Ky.), 652 (1873); Honneyman v. Oregon, etc., R. R., 13 Ore. 352, 57 Am. Rep. 20 (1886). But see Union S. S. Co. v. Ewart, 13 N. Z. L. R. 9 (1892).

[7] Citizens' Bank v. Nantucket Sb. Co., 2 Story, 16, B. & W. 8 (1841); Kuter v. Michigan C. Ry., 1 Biss. 35, 14 Fed. Cas. No. 7,955 (1855); Chicago, etc., R. Co. v. Thompson, 19 Ill. 578 (1858); Lee v. Burgess, 9 Bush (Ky.), 652 (1873); Mechanics' & T. Bk. v. Gordon, 5 La. Ann. 604 (1850); Choteau v. St. Anthony, 16 Mo. 216 (1852); Allen v. Sewall, 6 Wend. (N. Y.) 335 (1830); Pender v. Robbins, 6 Jones (N. C.) 207 (1858).

[8] Anonymous, 12 Mod. 3 (1680); Hosea v. M'Crory, 12 Ala. 349 (1847); Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133 (1822); Allen v. Sewall, 2 Wend. (N. Y.) 327 (1829); Farmers & M. Bank v. Champlain Tr. Co., 23 Vt. 186, 56 Am. Dec. 68 (1851); Kirtland v. Montgomery, 1 Swan 452 (1852).

an express company and that the express company carries money, does not make the railroad a carrier of money.[9]

§ 127. Cattle.

The carriage of live stock is not ordinarily within the profession of most carrers by land. In the case of railways, however, it is generally agreed that live stock comes within the classes of goods which the railway undertakes to carry and that the railway is therefore a common carrier of live stock in its cattle trains.[10]

[9] Kuter v. Michigan C. R. R., 1 Biss. 35 (1853).

[10] *Alabama*—South & N. A. R. R. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578 (1875); Cen. Railroad Co. v. Smitha, 85 Ala. 47 (1887).

Illinois—Ohio, etc., R. R. v. Dunbar, 20 Ill. 623 (1858); T., W. & W. R. Co. v. Hamilton, 76 Ill. 393 (1875); Toledo, etc., R. R. Co. v. Thompson, 71 Ill. 434 (1874); St. Louis, etc., R. v. Dorman, 72 Ill. 504 (1874); Illinois Cent. R. R. v. Hall, 58 Ill. 409 (1871).

Indiana—Evansville, etc., R. R. v. Young, 28 Ind. 516 (1867).

Iowa—McCoy v. Railroad, 44 Iowa, 424 (1875).

Kansas—Kansas Pac. R. R. Co. v. Nichols, 9 Kan. 235, 12 Am. Rep. 494 (1872); Kansas, etc., R. R. v. Reynolds, 8 Kan. 623 (1871); Railroad Co. v. Sampson, 30 Kan. 645 (1883).

Kentucky—Hall v. Renfro, 3 Met. (Ky.) 51 (1860).

Maine—Sager v. Portsmouth, etc., Railroad, 31 Me. 228 (1850).

Massachusetts—Evans v. Fitchburg R. R., 111 Mass. 142, 15 Am. Rep. 19 (1872); Smith v. Railroad, 12 Allen (Mass.), 531 (1866).

Minnesota—Lindsley v. Chicago, M. & St. P. Railroad Co., 36 Minn. 539 (1887); Moulton v. St. Paul, M. & M. Railroad Co., 31 Minn. 85, 47 Am. Rep. 781 (1883).

Mississippi—Chicago, St. L., N. O. Railroad Co. v. Abels, 60 Miss. 1017 (1883).

Missouri—Ballentine v. North. Mo. Railroad, 40 Mo. 491 (1867).

Nebraska—Chicago, etc., R. R. v. Williams, 61 Neb. 608, 85 N. W. 832 (1901); Atchinson, etc., R. v. Washburn, 5 Neb. 117 (1876).

New Hampshire—Rixford v. Smith, 52 N. H. 355 (1872).

New York—Harris v. Northern Ind. Railroad, 20 N. Y. 232 (1859); Clarke v. Rochester & S. Railroad, 14 N. Y. 570, 67 Am. Dec. 205 (1856).

North Carolina—Lee v. Raleigh & G. Railroad, 72 N. C. 236 (1875).

Ohio—Wilson v. Hamilton, 4 Ohio St. 722 (1855); Welsh v. Pittsburg, Ft. W. & C. Railroad, 10 Ohio St. 65 (1859).

In Michigan, however, a railway is held not to be a common carrier of live stock.[11]

§ 128. Carrier of passengers whether also a carrier of goods.

A carrier of passengers is not necessarily also a carrier of goods. His vehicles may not be adapted for that purpose, or he may not desire to carry on both lines of business. Even if he does occasionally carry goods for hire on his vehicles, he is not necessarily a common carrier of goods.[12] If, however, in addition to carrying passengers the carrier commonly takes or publicly professes to take goods, he is of course a common carrier of goods also. This often happened in the case of stage coaches.[13]

Oregon—See Honeyman v. Oregon, etc., R. Co., 13 Oregon, 352, 10 Pac. 660; 57 Am. Rep. 20 (1886).

Pennsylvania—Ritz v. Penn. R. Co., 3 Phila. (Pa.) 82, 15 Leg. Int. (Pa.) 75 (1858).

South Carolina—Bambeig v. So. Carolina R., 9 So. Car. 61, 30 Am. Rep. 13 (1877).

Tennessee—East Tenn., Vir. and Ga. Railroad Co. v. Hale, 85 Tenn. 69 (1886); Smitha v. Louisville & N. Railroad Co., 86 Tenn. 198 (1887); Louisville, etc., R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. Rep. 311 (1890).

Texas—Missouri Pac. Ry. Co. v. Harris, 67 Texas, 166 (1886).

Vermont—Kimball v. Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567 (1854).

Wisconsin—Betts v. Farmers' Loan Co., 21 Wis. 80 (1866); Ayres v. Railroad Co., 71 Wis. 372, 5 Am. Rep. 226 (1888).

Nashville & C. Railroad Co. v. Jackson, 6 Heisk, 271 1871).

[11] Michigan So. R. R. v. McDonough, 21 Mich. 165 (1870); Lake Shore & M. S. R. R. v. Perkins, 25 Mich. 329, 12 Am. Rep. 275 (1872).

[12] Elkins v. Boston & M. R. R., 23 N. H. 275 (1851); McRae v. Can. Pac. Ry., Montreal L. R. 4 S. C. 186 (1888). But see Levi v. Lynn & B. R. R., 11 Allen (Mass.), 300, 87 Am. Dec. 713 (1865).

[13] McHenry v. Railroad Co., 4 Har. (Del.) 448 (1846); Sales v. Western Stage Co., 4 Iowa, 547 (1857); Dwight v. Brewster, 1 Pick. (Mass.) 50 (1822); Hollister v. Nowlen, 19 Wend. (N. Y.) 234 (1838); Cole v. Goodwin, 19 Wend. (N. Y.) 251 (1838); Beckman v. Shouse, 5 Rawle (Pa.), 179, 28 Am. Dec. 653 (1835); Wallier v. Skipwith, Meigs (Tenn.), 502 (1838); Peixott v. McLaughlin, 1 Strob. (S. C.) 468 (1847); Frink v.

§ 129. Rolling stock.

It seems that a railroad company must accept for transportation at a reasonable rate for the service rendered locomotives, cars and other rolling stock. This was well stated in a Canadian case,[14] where Judge King said on this point: "The company having exercised the powers of these Acts, and having a railway track which the legislature allowed them to run, and being engaged in the transportation of goods under the Acts for compensation, must be taken (at least *prima facie* and in the absence of a more limited profession) to hold themselves out as carriers of all descriptions of property capable of being reasonably and conveniently transported over rails by a locomotive engine, to the extent to which they have the means and accommodation for such traffic. Here it does not appear that the defendants ever declined to transport this description of goods; on the contrary it appears that they had previously transported a locomotive for plaintiff, and in the case in question they received the cars without objection, and as if it were otherwise, for we know from common observation how much of the ordinary business of railroads consists in carrying goods in the freight cars of other companies; and we also know that cars and engines are transported from their place of construction for hundreds of miles over lines of railway other than that on which they are to be used. Then as to the means which the defendants had to accommodate this traffic, there is the fact that they did accommodate it, and apparently without difficulty; and indeed there could not be much difficulty, as the plaintiff supplied the trucks and wheels for the moving of his goods, and the only thing that the defendants needed to supply was the locomotive power and labor. It seems to me, therefore, that the defendants were common carriers as to these goods, and bound

Co., 4 G. Greene (Iowa), 555 (1854); Butler v. Basing, 2 Car. & P. 613 (1827); Blanchard v. Isaacs, 3 Barb. (N. Y.) 388 (1848).

[14] Greene v. St. John & M. Ry., 22 N. B. (P. & T.) 252 (1882).

to transport them, having the means to do so, and that (at all events in the absence of a rate of freight established according to statute) they were bound to transport them for a reasonable remuneration." [15]

§ 130. Newspapers.

In an important recent case, elsewhere discussed fully, one point was whether a railroad in making a special arrangement with one newspaper company could maintain that it was under no duty to carry the newspapers of another publisher upon this train, as it had made no public profession to do so.[16] The court held that it was bound to do so,; an extract from the apinion will show the modern view of this subject: "It is contended that it was, by reason of its contract with the Commercial Publishing Company, a private carrier of newspapers, and therefore was under no obligations to admit the newspapers of the complainant on its train. It is true that 'a common carrier may become a private carrier or bailee for hire, when as a matter of accommodation or special agreement he undertakes to carry something which it is not his business to carry." For example, "If a carrier of produce, running a truck boat, should be requested to carry a keg of silver or a load of furniture, he might justly refuse to receive such freight, except by such an agreement as he might choose to make. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered

[15] Accord in principle, Rogers Locomotive Works v. Erie Ry., 20 N. J. Eq. 379 (1869).

[16] News Publishing Co. v. Southern Ry., 110 Tenn. 684, 755 W. 941 (1903).

powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." [17]

§ 131. Other special classes of goods.

If the goods, while similar in bulk and in manner of use to goods actually carried, are fragile or dangerous, or otherwise require special treatment, a carrier who has never professed to carry them may refuse to accept them as a common carrier. So where an express company had never professed to carry glass as a common carrier, and on the terms required of a common carrier, writ of mandamus to compel the company to receive and carry glass on such terms was refused.[18] And so where the goods are of a dangerous nature, it seems clear that the carrier may refuse to receive them on the ground that he has never professed to carry goods of that kind.[19] For as has been seen many times in the course of this discussion, there are for various natural reasons different classes of goods, and a practice of taking goods of one class does not establish any profession to take goods of another class. Thus in an early case in Delaware, Tunnel v. Pettijohn,[20] a carter who usually carried parcels of moderate size, but who had taken a hogshead of molasses after first refusing it because of its size, was held not responsible for it as a common carrier. The grounds of the court were: "There seems to be good reason for distinguishing between this and other kinds of goods, on

[17] Cited from Hutchinson on Carriers, § 44, and from New York C. R. R. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627 (1873).

[18] People *ex rel.* Walker v. Babcock, 16 Hun (N. Y.), 313 (1818); Toy v. Long Island Railroad, 26 Misc. (N. Y.) 792, 56 N. Y. Suppl. 182 (1899). See, also, Pender v. Robbins, 51 N. C. 207 (1858).

[19] California Powder Works v. Atlantic, etc., R. Co., 113 Cal. 329, 45 Pac. Rep. 691, 36 L. R. A. 648 (1896); Farrant v. Barnes, 11 C. B. N. S. 553, 8 Jur. N. S. 868, 31 L. J. C. P. 137, 103 E. C. L. 553 (1862), per Erle, C. J.; Alston v. Herring, 11 Exch. 822, 25 L. J. Exch. 177 (1856).

[20] 2 Harr. (Del.) 48 (1836).

account of its bulk and weight, and it also appears that the defendant's cart is too small for such freight."

§ 132. Obligation to carry all goods of a class.

Whatever may have been the rule laid down in some of the English and Canadian cases, it is probable that in this country a carrier who undertakes to carry certain goods of a certain sort must carry all of the same general nature. A wagoner might certainly refuse to carry very bulky goods if he had never professed to carry them,[21] but if a wagoner had professed to carry fruit he could not refuse to carry vegetables, or if he had professed to carry tables he could not refuse to carry chairs. Everything of the same general nature with the things carried, and readily transported in the same way and by the same means, must be taken. It would hardly be possible in this country to accept the view apparently taken by the Canadian court, that a carrier might carry all other kinds of lumber but refuse to carry cedar lumber.[22]

TOPIC F.—REGULAR BUSINESS.

§ 133. Special agreement.

In some kinds of carriage it is necessary to make in each case a special agreement; and it has been claimed that this is inconsistent with common carriage. This seems not necessarily to be true. If all the terms of the transaction lie in the agreement of the parties it is to be sure rather difficult to find a profession of readiness to serve all. But when further facts show that the carrier is ready and willing to undertake the service for all

[21] Tunnel v. Pettijohn, 2 Harr. (Del.) 48 (1836).

[22] Rutherford v. Grand Trunk Ry., 5 Rev. Leg. (Can.) 483, *supra*. See, also, Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393 (1847); Toy v. Long Island R. R. Co., 26 Misc. (N. Y.) 793, 56 N. Y. Suppl. 182 (1899); Pender v. Robbins, 51 N. C. 207 (1858); Johnson v. Midland R. R. Co., 4 Exch. 367, 18 L. J. Exch. 366, 6 R. & Can. Cases, 61 (1849).

that apply, and that the reason why it is common to make a special agreement in each case is that the individual transactions are seldom quite alike, because each applicant generally requires a little different service, it is quite possible to regard each transaction as goverened by the law of common carriage. So also, if the only matter requiring agreement is the amount of compensation, and the reason that no regular charges are established is that the individual transactions are so various in nature that it is impossible for the carrier to frame in advance a tariff of charges, the carrier may be a common carrier.[1] The court say of a truckman, holding him a common carrier: "The necessity for a different charge in each case arises, of course, out of the difference of labor in handling articles of great bulk."

§ 134. Establishment of regular charge.

The establishment by a carrier of a regular tariff charge for the carriage of a certain article is evidence that the carrier is a common carrier of that article. So where an express company received a dog to be shipped to a certain place for three dollars, which was found to be the regular charge, the court remarked that "the fact that the company had established regular charges for such freight, tends to show that they were in the transportation business."[2]

§ 135. Permanent profession.

The profession to serve all makes the employment a public one; and therefore the carrier who holds himself out as ready to carry for all on a particular journey or voyage is at that moment a common carrier, though this is his first journey and he has never yet carried;[3] and this is equally the case though he

[1] Jackson A. Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665 (1899).
[2] Southern Express Co. v. Ashford, 126 Ala. 891, 28 So. 732 (1900).
[3] Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393 (1847); Fuller v. Bradley, 25 Pa. St. 120 (1855); Brind v. Dale, 8 C. & P. 207, 2 M. & Rob.

does not intend to continue the profession, and makes his offer for the single journey only.[4]

§ 136. General practice.

In general it may be said that to constitute public profession the business must be carried on upon the basis of indiscriminate service. If the business is carried on upon special arrangement made in each particular case, that is proof that the undertaking is private only. Again, if the business is regular, carried on by fixed practice, it will generally be held to be upon a public basis; while if it is casual, undertaken at some special time for some special reason, it is more apt to be held private. An occasional refusal to serve is not conclusive evidence that the business is private, for it may have been a stray instance of illegal refusal to serve in a business that was nevertheless public because of general practice to serve all. And on the other hand if a man has decided upon the undertaking of public business, he is as much in public service in performing his first service for the first applicant as at any later time; though the proof may in such cases be more difficult.

80, 34 E. C. L. 692 (1837); Roussiel v. Aumais, 18 Quebec Super. Ct. 474 (1900).

[4] Steele v. McTyler, 31 Ala. 667, 70 Am. Dec. 516 (1858); Harrison v. Roy, 39 Miss. 396 (1860); Gordon v. Hutchinson, 1 Watts & S. (Pa.) 285, 337 Am. Dec. 464 (1841); Moss v. Bettis, 4 Heisk (Tenn.), 661, 13 Am. Rep. 1 (1871); Chevallier v. Straham, 2 Texas, 115, 47 Am. Dec. 639 (1847); Haynie v. Baylor, 18 Texas, 498 (1857).

CHAPTER V.

COMMON CARRIAGE INVOLVES COMPENSATION.

§ 141. Common carriage is compensated carriage.

TOPIC A—COMPENSATED CARRIAGE.

§ 142. Carriage is for hire unless it is otherwise agreed.
143. Pass issued for business reasons.
144. Carrier's services in returning goods compensated.
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TOPIC B—GRATUITOUS ARRANGEMENTS.

§ 148. Gratuitous carrier liable for negligence.
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150. Carriage of children and servants.
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TOPIC C—SPECIAL CLASSES OF PERSONS.

§ 152. Mail clerks and express messengers.
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§ 154. Persons never accepted in a proper place not passengers.
155. Carriage of goods secured by fraud.
156. Stealing a ride.
157. Riding on invalid ticket.
158. Attempt to escape conductor's notice.
159. Riding free by connivance of the conductor.
160. Guest of servant of the carrier.

§ 141. Common carriage is compensated carriage.

The receipt of compensation is a necessary part of the conception of common carriage. One who is serving gratuitously

is not a common carrier. It would, of course, be outrageous to hold a person in public calling because of any acts of generosity in performing various services for various members of the public gratuitously; and therefore bind him thereafter to serve all members of the public free. At the same time, if there is in reality compensation for the act, which is apparently done free by reason of its connection with another part of the same transaction in the course of which payment is given, then it would not be right to relieve the carrier, who is thus actuated by a business motive, from the liability resting upon those who carry on a public business merely because no separate item of compensation can be referred to the carriage in question.

TOPIC A—COMPENSATED CARRIAGE.

§ 142. Carriage is for hire unless it is otherwise agreed.

In the absence of an agreement to the contrary, when a common carrier takes goods to carry they are to be carried for hire.[1] In the case of Gray v. Missouri River Packet Company,[2] it appeared that plaintiff applied to one Rider, captain of the steamboat "Alice," which was being used by defendants in their business as carriers, to ship his horse and jack, and that he agreed to transport them for him. He asked Rider what would be the charge, who said in reply that it would not be much, if anything; and Rider in fact did not intend to charge him anything. Notwithstanding this intention, the defendants were held to be common carriers. Mr. Justice Norton said: "We apprehend that if Gray had been sued for the transportation of his stock, it would have been no reply to the action for him to have set up as a defence that Rider said when he was applied to for the price that he would not charge him much, if anything.

1 Bastard v. Bastard, 2 Shower (Eng.), 81, B. & W. 283 (1679). See Knox v. Rives, 14 Ala. 249 (1848).

2 64 Mo. 47 (1876).

"After an injury results to property intrusted to a common carrier for transportation, who upon receiving it for that purpose declined to fix the price or charge for the transportation, he cannot be allowed to come in and defeat a recovery by saying that at the time of its reception he had a secret intention, unexpressed to the shipper or consignor, and not agreed to by him, not to charge anything, and that the transportation was gratuitous and not for hire."

So, where the carrier is given goods to sell and bring back the proceeds, he is a common carrier of the money while he is bringing it back. "Although no commission or distinct compensation was to be received upon the money, yet, according to the evidence, it appears to be a part of the duty attached to the employment, and in the usual and ordinary course of the business, to bring back the money when the cargo is sold for cash. The freight of the cargo is the compensation for the whole; it is one entire concern." [3]

A leading case on this subject is Pierce v. Milwaukee Railroad.[4] This was an action to recover the value of eight hundred empty grain bags which it was averred that the defendant railroad was transporting as a common carrier. It was shown at the trial that, as was customary, these bags were being carried back to the original shipper of the grain free; defendant claimed therefore that it was liable only as a gratuitous bailee. The judgment for the plaintiff was upon the theory that this was compensated carriage, which the upper court upheld.

Mr. Justice Paine said: "The company, by establishing such a custom, makes the proposition to all persons, that if they will become its customers, it will carry their bags both ways without any other compensation than the freight upon the grain. Persons who become its customers in view of such a custom do so

[3] Kemp v. Coughtry, 11 Johns. (N. Y.) 107 (1814). Acc. Emery v. Hersey, 4 Me. 407, 16 Am. Dec. 268 (1827); Harrington v. McShane, 2 Watts (Pa.), 443 (1834); Taylor v. Wells, 3 Watts (Pa.), 65 (1834).

[4] 23 Wis. 38, B. & W. 126 (1868).

with that understanding. And the patronage and the freights paid are the consideration for carrying the bags. The company, in making such a proposition, must consider that this additional privilege constitutes an inducement to shippers to give it their freight. And it must expect to derive a sufficient advantage from an increase of business occasioned by such inducement, to compensate it for such transportation of the bags. And it ought not to be allowed, when parties have become its customers with such an understanding, after losing their bags, to shelter itself under the pretext that the carrying of the bags was a mere gratuity, and it is therefore liable only for gross negligence. It makes no difference that the custom is described as being to carry the bags *free*. In determining whether they are really carried 'free' or not, the whole transaction between the parties must be considered. And when this is done, it is found that all that is meant by saying that the empty bags are carried free is, that the customers pay no other consideration for it than the freight derived from the business they give the company. But this, as already seen, is sufficient to prevent the transportation of the bags from being gratuitous." [5]

§ 143. Pass issued for business reasons.

Where a pass is issued for business reasons the passenger using it is not strictly a gratuitous passenger, but the carrier in transporting him is a common carrier. Thus, a pass issued to officials of another road, in accordance with a custom of railroads to exchange passes, is given for a consideration, and the person using it is not strictly a free passenger; [6] and the same thing is true of a pass issued to a person to travel over the road on business of the road,[7] and of a pass issued to a drover to

[5] Acc. Aldridge v. Great Western Ry., 15 C. B. N. S. 582 (1864; *semble.*)

[6] Steamboat New World v. King, 16 How. (U. S.) 469, 14 L. Ed. 1019 (1853).

[7] Grand Trunk Ry. v. Stevens, 95 U. S. 655, 24 L. Ed. 535 (1877) (traveling on invitation of the road to show a patent coupling).

travel with cattle.[8] In the case of New York Central Railroad v. Lockwood,[9] Mr. Justice Bradley said: "It may be assumed *in limine* that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle."

This is further elucidated in Pennsylvania Railroad v. Henderson[10] by Mr. Justice Read: "As it is absolutely necessary in carrying stock that the persons who have charge of them should be carried by the company, the price paid for the freight includes the cost of transporting the drover, who is not therefore a gratuitous but a paying passenger, and the word free is therefore only true so far as that the conductor is not entitled to charge him separately for his passage."

§ 144. Carrier's services in returning goods compensated.

A carriage may be for hire, though no compensation is paid for it specifically, if it forms part of an entire transaction for which compensation is paid, which most commonly happens where the carriage in question consists of bringing back to a shipper some portion of or payment for goods for the carriage of which payment has been made. Such a case was Spears v. Lake Shore & Michigan Southern Railroad.[11] The plaintiff owned tanks, used for transporting oil, which were fastened to platform cars. The oil was billed to the owner, no mention being made of the tanks; and no freight was paid for the tanks, either full or empty. The tanks and contents were destroyed by accidental fire while on the defendant's line. It was held that

[8] New York C. R. R. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627, B. & W. 498 (1873); Flinn v. Philadelphia R. R., 1 Houst. (Del.) 469 (1857); Illinois C. R. R. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210 (1898); Pennsylvania R. R. v. Henderson, 51 Pa. St. 315 (1865).

[9] *Supra.*

[10] *Supra.*

[11] 67 Barb. (N. Y.) 513 (1876).

defendant was liable as a common carrier, freight being included in the freight paid for the oil. So, where goods are shipped C. O. D., one charge being made for the entire transaction, the carrier is compensated by the single payment for returning the money, and he is therefore a common carrier of the money.[12]

§ 145. Carriage of baggage is compensated.

The carrier of passengers is bound to carry with the passenger certain articles of personal use which the passenger must keep with him on the journey. For carrying such baggage along with the passenger the carrier might make a separate charge.[13] But it is customary for the carrier to carry mere personal baggage without charging an additional sum for it. The carriage is not gratuitous in such a case; the compensation for it is included in the fare for carrying the passenger.[14]

The baggage which the company so carries in consideration of the passenger's fare comprises merely the ordinary personal effects of the passenger, which he will need on his journey.[15]

[12] Zollinger v. The Emma, Fed. Cas. No. 18,218 (1876).

[13] Vin. Abr. 220.

[14] Great Northern Ry. v. Shepherd, 8 Ex. (Eng.) 30 (1852); Woods v. Devin, 13 Ill. 746, 56 Am. Dec. 483, B. & W. 130 (1852); Perkins v. Wright, 37 Ind. 27 (1871); Smith v. Boston & Me. R. R., 44 N. H. 325 (1862); Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129 (1832); First Nat. Bank v. Marietta R. R., 20 Ohio St. 259, 5 Am. Rep. 655 (1880); Runyan v. Cent. R. Co., 61 N. J. L. 537, 41 Atl. 367, 68 Am. St. Rep. 711, 43 L. R. A. 284 (1898).

[15] It is obviously impossible to discuss at length the question of what constitutes baggage. The subject can be sufficiently examined in the following cases:

United States—Hannibal & S. J. R. R. v. Swift, 12 Wall. (U. S.) 262, 20 L. Ed. 423 (1870); New York C. & H. R. R. R. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531 (1879).

Connecticut—Hickox v. Naugatuck R. R., 31 Conn. 281 (1863).

Illinois—Woods v. Devin, 13 Ill. 746, B. & W. 130 (1852); Michigan Cent. R. R. v. Carrow, 73 Ill. 348 (1874).

In Woods v. Devin,[16] to quote from one case, an excellent summary of the general law is given by Chief Justice Treat: "The principle of the authorities is, that the term 'baggage' includes a reasonable amount of money in the trunk of a passenger intended for travelling expenses, and such articles of necessity and convenience as are usually carried by passengers for their personal use, comfort, instruction, amusement or protection; and that it does not extend to money, merchandise, or other valuables, although carried in the trunks of passengers, which are designed for different purposes. And regard may with propriety be had to the object and length of the journey, the expenses attending it, and the habits and condition in life of the passenger." A more definite rule cannot well be laid down. The remarks of Bunson, J., in Hawkins v. Hoffman,[17] are pertinent. He says: "It is undoubtedly difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for some men carry nothing, or very little, with them when they travel, while others consult their convenience by carrying many things. Nor do I intend to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus, and the like, which most persons deem indis-

Indiana—Ohio & Miss. R. W. Co. v. Nickless, 71 Ind. 271 (1880); Staub v. Kendrick, 121 Ind. 226, 23 N. E. 79 (1889).

Kansas—Kansas City F. S. & G. R. R. v. Morrison, 34 Kan. 520, 9 Pac. 225 (1886).

Massachusetts—Connolly v. Warren, 106 Mass. 146 (1870); Blumantle v. Fitchburg R. R., 127 Mass. 322 (1879).

Missouri—McLean v. Rutherford, 8 Mo. 109 (1834)

North Carolina—Bland et al. v. Womack, 2 Murphy, 373 (1818).

Oregon—Oakes v. No. Pac., 20 Ore. 392, 26 Pac. 230 (1891).

Wisconsin—Gleason v. Transportation Co., 32 Wis. 85 (1873).

England—Hudston v. Midland Ry., L. R. 4 Q. B. 366; Macrow v. Great Western Ry., L. R. 6 Q. B. 121 (1871).

[16] *Supra.*

[17] 6 Hill (N. Y.), 586 (1845).

pensable. If one has books for instruction or his amusement by the way, or carries his gun or fishing-tackle, they would undoubtedly fall within the term 'baggage,' because they are usually carried as such."

§ 146. Baggage carried without compensation.

As the baggage carried by the carrier and paid for in the fare is limited to the personal baggage carried with the passenger, it follows that if the passenger induces the carrier without further payment to carry something which is not personal baggage or to carry it apart from the passenger, the carriage is gratuitous. Furthermore, since the tender of what appears to be baggage for free carriage ordinarily involves a representation that the article tendered is personal baggage going with the passenger, it is accepted and carried on that basis, and if it is anything else the carrier cannot be held responsible for it in any way.

If, therefore, the passenger delivers as baggage to the carrier articles of merchandise or other things not personal baggage, the carrier, taking them as baggage, is not responsible for their loss. "There was no undertaking to carry merchandise, and he had no right to impose his goods subtilely upon the company, and then seek to make the obligation that of a common carrier." [18]

[18] The quotation is from Scott, J., in Michigan Cent. R. R. v. Carrow, 73 Ill. 348 (1874).

See, also:

United States—Humphreys v. Perry, 148 U. S. 627, 37 L. Ed. 587, 13 Sup. Ct. 711 (1893).

Georgia—Georgia R. Co. v. Johnson, 113 Ga. 589, 38 S. E. 954 (1901).

Indiana—Doyle v. Kiser, 6 Ind. 242 (1855).

Maine—Bluementhal v. Maine Cent. R. Co., 79 Me. 550, 11 Atl. 605 (1887).

Massachusetts—Stimson v. Conn. River R. Co., 89 Mass. 83, 93 Am. Dec. 140 (1867); Collins v. Boston, etc., R., 10 Cush. (Mass.) 506 (1852); Jordon v. Fall River R. Co., 5 Cush. (Mass.) 69, 51 Am. Dec. 44 (1849).

If, however, the carrier has notice that the articles are merchandise and accepts them for carriage, notwithstanding he is a gratuitous carrier he is responsible for any negligent injury to the goods. As Baron Parke said, in Great Northern Railway v. Shepard:[19] "If the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the company might have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for the loss. . . . If, indeed, they had notice, or might have suspected from the mode in which the parcels were packed that they did not contain personal luggage, then they ought to have objected to carry them."

Indeed, under certain circumstances carriers might gladly carry merchandise in this way as a method of increasing their business, and in that case they would be carriers for hire and therefore under the liability of common carriers.[20] "If he de-

Minnesota—McKibbin v. Great Northern R. Co., 78 Minn. 232, 80 N. W. 1052 (1899); Haines v. Chicago, St. P., M. & O. Ry. Co., 29 Minn. 160, 43 Am. Rep. 199, 12 N. W. 447 (1882).

Mississippi—Miss. Cen. R. Co. v. Kennedy, 41 Miss. 671 (1868).

Missouri—Rider v. Wabash, etc., R. Co., 14 Mo. App. 529 (1884).

New York—Blanchard v. Isaacs, 3 Barb. (N. Y.) 388 (1848); Bell v. Drew, 4 E. D. Smith (N. Y.), 59 (1855).

Ohio—Toledo, etc., R. Co. v. Bowler, etc., Co., 63 Ohio St. 274, 58 N. E. 813 (1900).

Pennsylvania—Vemer v. Sweitzer, 32 Pa. St. 208 (1858).

Texas—Jones v. Puester, 1 Tex. App. Civ. Cas. 613 (1877).

England—Belfast, etc., R. Co. v. Keys, 9 H. L. Cas. 556, 8 Jus. N. S. 367 (1861), 4 L. T. Rep. N. S. 841, 9 Wkly. Rep. 793; Great North. R. Co. v. Shepherd, 8 Ex. (Eng.) 30 (1852).

[19] *Supra.*

[20] *United States*—Hannibal, etc., R. Co. v. Swift, 12 Wall. (U. S.) 262, 20 L. Ed. 423 (1870); Jacobs v. Tutt, 33 Fed. 412 (1888).

Arkansas—Kansas City R. Co. v. McGahey, 63 Ark. 344, 38 S. W. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781n (1897).

Illinois—Hamburg Am. Packet Co. v. Gattman, 127 Ill. 598, 20 N. E. 662 (1889).

sired to have his merchandise or wares go upon the train with him, it was but just to the carrier he should disclose its nature and value, and if the company then chose to treat it as baggage, the liability of a common carrier would attach, but not otherwise."[21] And *a fortiori* when the carrier, knowing the nature of the goods, charges and accepts extra compensation, he is responsible for them as a common carrier.[22]

§ 147. Baggage carried apart from the passenger.

For a similar reason a carrier is not responsible as a common carrier for baggage sent on by the owner when the owner does not accompany it as a passenger. The baggage which the carrier undertakes to transport without additional compensation is such baggage as may be carried with the passenger. Of course if the baggage is carried apart from the passenger for the convenience of the carrier without request of the passenger, or is so carried by agreement between the carrier and the passenger, the carrier is liable; but otherwise baggage sent before or after the passenger is to be dealt with and paid for as ordinary freight,

Kansas—Chicago, etc., R. Co. v. Conklin, 32 Kan. 55, 3 Pac. 762 (1884).
Missouri—Minter v. Pac. R. R., 41 Mo. 503, 97 Am. Dec. 288 (1867).
New York—Stoneman v. Erie R. Co., 52 N. Y. 429 (1873).
Ohio—Toledo, etc., R. Co. v. Dages, 57 Ohio St. 38, 47 N. E. 1039, 63 Am. St. Rep. 702 (1897).
Oregon—Oakes v. No. Pac. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318 (1891).
Texas—Snaman v. Mo., etc., R. Co. (Tex. Civ. App.), 42 S. W. 1023 (1897).
England—Gt. Northern Ry. v. Shepherd, 8 Exch. 30, 21 L. J. Exch. 286, 7 R. & Can. Cas. 310 (1852).
But see Blumantle v. Fitchburg R. R., 127 Mass. 322, 34 Am. Rep. 376n (1879).

21 Scott, J., in Michigan Cent. R. R. v. Carrow, *supra*.

22 Stoneman v. Erie Ry., 52 N. Y. 429 (1873); Sloman v. Great Western Ry., 67 N. Y. 208 (1876); Millard v. Missouri, K. & T. R. R., 86 N. Y. 441 (1881); Texas & P. R. R. v. Capps, 2 Wills App. (Tex.) § 34 (1883).

and if the passenger presents it and procures it to be carried as baggage, the carrier is not responsible for it.[23]

In Wilson v. Grand Trunk Railway,[24] Chief Justice Appleton said: "The fare paid by a passenger for transportation over a railroad is the compensation for his carriage, for the transportation at the same time of such baggage as he may require for his personal convenience and necessity during his journey. Baggage subsequently forwarded by his direction, in the absence of any special agreement with the carrier or of negligence on his part, is liable, like any other article of merchandise, to the payment of the usual freight."

TOPIC B—GRATUITOUS ARRANGEMENTS.

§ 148. Gratuitous carrier liable for negligence.

While a purely gratuitous carriage cannot make the carrier liable as a common carrier, he is liable, like any gratuitous bailee, for gross negligence.[1]

[23] *Federal Courts*—The Elvira Harbeck, 2 Blatchf. (U. S.) 336, Fed. Cas. No. 4,424 (1857).

Connecticut—Beers v. Boston & A. R. R., 67 Conn. 417, 34 Atl. 541, 52 Am. St. Rep. 293, 32 L. R. A. 535 (1896).

Indiana—Perkins v. Wright, 37 Ind. 27 (1871).

Iowa—Warner v. Burlington & Mo. R. R. R., 22 Ia. 166 (1867).

Maine—Graffam v. Boston & M. R. R., 67 Me. 234 (1877); Wilson v. Grand Trunk Ry., 56 Me. 60, 96 Am. Dec. 435, B. & W. 128 (1868); Wood v. Maine Central Ry. 98 Me. 98, 56 Atl. 457 (1903).

Michigan—Flint & Pere M. Ry. v. Weir, 37 Mich. 111 (1877); Marshall v. Pontiac, etc., Ry., 126 Mich. 45, 85 N. W. 242 (1901).

New York—Fairfax v. New York Cen. R. R., 37 N. Y. Sup. Ct. 516 (1874); Burkett v. New York Cen. R. R., 24 Misc. (N. Y.) 76, 53 N. Y. Supp. 394 (1898).

Virginia—Chesapeake R. R. v. Wilson, 21 Grattan (Va.) 654 (1872).

[24] *Supra.*

[1] Louisville, etc., R. Co. v. Gerson, 102 Ala. 409, 14 So. 873 (1894); Rice v. Ill. Cent. R. Co., 22 Ill. App. 643 (1887); Adams Exp. Co. v. Cressap, 6 Bush. (Ky.) 572 (1869); Flint & P. M. R. R. v. Weir, 37 Mich. 111, 26 Am. Rep. 499 (1877); Dudley v. Camden, etc., Ferry Co., 42 N. J. L. 25, 36 Am. Rep. 501 (1880); Coggs v. Bernard, 2 Ld. Raym. 909 (1704).

As to what constitutes gross negligence there is much difference of opinion. It is commonly assumed that less care is due from a common carrier to one whose goods he carries gratuitously than toward an ordinary shipper who pays for the carriage; and this view is expressed by Mr. Chief Justice Cooley, in Flint & Pere Marquette Railroad v. Weir:[2] "There can be no question that a railway company which receives property for gratuitous carriage assumes, like any other gratuitous bailee, certain duties in respect to it, and that a suit will lie for a failure to perform these duties. But the obligation in such case is quite different from the obligation of a bailee who, for a consideration, received, or promised, undertakes to carry or to perform any other service with respect to the subject of the bailment. In the latter case the terms of the contract, if an express contract was made, will be the measure of the duties to be performed; and in the absence of any express contract the law itself will impose upon the bailee a higher degree of care and watchfulness than it demands of him who, for the mere accommodation of the bailor, undertakes the charge of his goods. The gratuitous bailee must not be reckless; he must observe such care as may reasonably be required of him under the circumstances; but it is not the same care which is required of the bailee who, for his own profit, assumes the duty. This is elementary, and is so reasonable that it requires no discussion. When care is bargained for and compensated, something is expected and is demandable beyond what can be required of him who undertakes a merely gratuitous favor."[3]

[2] *Supra.*

[3] The following cases discuss gross negligence in gratuitous carriage:
California—Fay v. Steamer New World, 1 Cal. 348 (1850).
Kentucky—Adams Exp. Co. v. Cressop, 6 Bush, 572 (1869).
Maine—Knowles v. R. Co., 38 Me. 55 (1854).
New Hampshire—Graves v. Ticknor, 6 N. H. 537 (1834).
New York—Beardslee v. Richardson, 11 Wend. 25 (1833); Onderkirk v. Bank, 119 N. Y. 263 (1890).

But this view, though the one commonly expressed, is probably not quite accurate. The gratuitous carrier, to be sure, is not responsible for all losses for which a common carrier is liable; but where a common carrier takes gratuitously he must carry according to the care he has undertaken. Since he has undertaken to carry the goods along with those which he is carrying for hire, and in the same way, he is responsible for any neglect to furnish such care as is requisite for carrying on his business. For a gratuitous bailee undertakes to use such skill as he possesses.[4]

In an action against a gratuitous bailee of a horse for an injury suffered by the horse, Baron Parke said:[5] "The defendant was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use. . . . In the case of a gratuitous bailee, where his profession or situation is such as to imply the possesion of competent skill, he is equally liable for the neglect to use it."

§ 149. Gratuitous passenger.

However this may be decided in the case of gratuitous carriage of goods, there is no doubt that a person carried gratuitously by a railroad is a passenger, and is entitled to the same care as any passenger.[6]

North Carolina—Bland v. Nomach, 2 Murphy, 373 (1818); Pender v. Robbins, 6 Jones (Law), 207 (1858).

England—Nelson v. Mackintosh, 1 Starkie, 237 (1816); Booth v. Wilson, 1 B. & Ald. 59 (1817); Doorman v. Jenkins, 2 A. & E. 256 (1834).

But see Adams Exp. Co. v. Darnell, 31 Ind. 20, 99 Am. Dec. 582 (1869); McLean v. Rutherford, 8 No. 109 (1834); Howard Exp. Co. v. Wile, 64 Pa. St. 201 (1870).

[4] Shiells v. Blackburn, 1 H. Bl. (Eng.) 158 (1789).

[5] Wilson v. Brett, 11 M. & W. (Eng.) 113 (1843).

[6] *United States*—Philadelphia & R. R. R. v. Derby, 14 How. (U. S.) 468, 14 L. Ed. 502.

Illinois—Benner Livery, etc., Co. v. Busson, 58 Ill. App. 17 (1894).

But a carrier who is carrying a passenger gratuitously does not owe him the duty owed by a common carrier; and though he is obliged to take care even of a gratuitous passenger, still the obligations of the common carrier do not bind him. The question commonly arises where a passenger riding on a free pass exempts the carrier from liability for injury by negligence. Such an exemption is binding, though in the case of a common carrier it would be void.[7]

In Northern Pacific Railway v. Adams,[8] Mr. Justice Brewer said: "The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He

Indiana—Gillenwater v. Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101 (1854); Ohio, etc., R. Co. v. Mickless, 71 Ind. 271 (1880); Russell v. Pittsburgh R. Co., 157 Ind. 305, 61 N. E. 678, 87 Am. St. Rep. 214, 55 L. R. A. 253 (1901).

Iowa—Rose v. Des Moines Valley R. Co., 39 Iowa, 246 (1874).

Maine—Hoar v. Me. Cent. R. R., 70 Me. 65 (1879).

Maryland—State v. Western Maryland R. Co., 63 Md. 433 (1884).

Massachusetts—Todd v. Old Colony R. R. Co., 3 Allen (Mass.), 18, 80 Am. Dec. 49 (1861); Wilton v. Middlesex R. R., 107 Mass. 108 (1871); Wilton v. Middlesex R. R., 125 Mass. 130 (1878); Littlejohn v. Fitch. R. Co., 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502 (1889); Doyle v. Fitch. R. Co., 162 Mass. 66, 37 N. E. 770, 44 Am. St. Rep. 335, 25 L. R. A. 157 (1894).

Missouri—Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799 (1878); Buck v. People's St. R., etc., Co., 46 Mo. App. 555 (1891); Dorsey v. Atchinson, etc., R. Co., 83 Mo. App. 528 (1900).

New York—Perkins v. N. Y. C. R. Co., 24 N. Y. 196, 82 Am. Dec. 282 (1862); Carroll v. Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221 (1874).

Pennsylvania—Buffalo, etc., R. Co. v. O'Hara, 3 Pennyp. (Pa.) 190, 12 Wkly. Note Cas. (Pa.) 473 (1882).

Texas—Gulf, etc., R. Co. v. McGown, 65 Tex. 640 (1886).

[7] Northern Pac. Ry. v. Adams, 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. 408 (1904); Griswold v. New York & N. E. R. R., 53 Conn. 371, 55 Am. Rep. 115 (1885); Quimby v. Boston & M. R. R., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846, B. & W. 506 (1890).

[8] *Supra.*

was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege cannot repudiate the conditions."

In Quimby v. Boston & Maine Railroad,[9] Mr. Justice Devens said: "Certainly the carrier is not likely to urge upon others the acceptance of free passes, as the success of his business must depend on his receipts. There can be no difficulty in the adjustment of terms where passes are solicited as gratuitous. When such passes are granted by such of the railroad officials as are authorized to issue them, or by other public carriers, it is in deference largely to the feeling of the community in which they are exercising a public employment. The instances cannot be so numerous that any temptation will be offered to carelessness in the management of their trains, or to an increase in their fares, in both of which subjects the public is interested. In such instances, one who is ordinarily a common carrier does not act as such, but is simply in the position of a *gratuitous bailee*. The definition of a common carrier, which is that of a person or corporation pursuing the public employment of conveying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to the solicitation of the passenger, he consents for the time being to put off his public employment, and to do that which it does not impose upon him. The plaintiff was in no way constrained to accept the gratuity of the defendant; it had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that

[9] *Supra.*

it should not be compelled, in addition to carrying the passenger gratuitously, to be responsible to him in damages for the negligence of its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of the various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that, beside the gift of free transportation, the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor, in holding that he need not be under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price on being exonerated from responsibility for the negligence of his servants. In such a case the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities, or limit the obligations which it imposes upon him."

In several jurisdictions it is held that even in the case of a free passenger a limitation of liability for negligence is invalid; but this is on general grounds of public policy, and it is not denied that the carrier is as to such passenger a mere private carrier.[10]

§ 150. Carriage of children and servants.

In order that a person may be a passenger it is not necessary that the relation of passenger and carrier be established through an agreement and payment of fare made by himself. The agreement may be made and the fare paid by a third person. Such was the case where the owners of slaves paid their passage and shipped them on steamboats to a certain destination. These slaves were held to occupy the position of passengers towards the carriers.[11]

[10] Jacobus v. St. Paul R. R., 20 Minn. 125, 18 Am. Rep. 360 (1873); Gulf C. & S. F. R. R. v. McGown, 65 Tex. 640 (1886).

[11] Boyce v. Anderson, 2 Pet. (U. S.) 150, 7 L. Ed. 379 (1829).

So, in the case of a young child travelling free with its parent, under a statute or a rule of the company, which permits such a child to travel without the payment of fare, the agreement in this case, if any, is made by the person with whom the child is travelling; but the child occupies towards the carrier the position of a passenger from the time it is received with the adult passenger.[12] And so a servant whose fare is paid by his master is a passenger.[13] In short, the relation of passenger and carrier does not arise, necessarily out of a payment of fare or a contract or obligation to pay it. The relation comes into existence whenever a person is rightfully carried by a carrier as passengers are carried.

§ 151. Riding by mistake.

In the same way one who takes a train intending to pay his fare with a ticket which he *bona fide* believes to be a good one is a passenger, though in fact the ticket is not good for a passage in that train, because the train is a limited one,[14] or because it is a freight train which the passenger *bona fide* but wrongfully believed, would carry passengers.[15]

One who through mistake gets into the wrong train is to be regarded as a passenger until he learns his mistake and has a chance to leave the train, or decides to stay on the train and pay his fare.[16]

[12] Austin v. Great W. Ry., L. R. 2 Q. B. 442 (1867); Littlejohn v. Fitchburg R. R., 148 Mass. 478, 20 N. E. 103 (1889); Whitney v. Pere Marquette R. R. (Mich.), 1 L. R. A. (N. S.) 352 (1906).

[13] Marshall v. York N. & B. Ry., 11 C. B. 655 (1851); Mims v. Seaboard Air Line Ry., 69 S. C. 338, 48 S. E. 269 (1904).

[14] Lake S. & M. S. R. R. v. Rosenzweig, 113 Pa. 519, 6 Atl. 545, 4 Cent. 712 (1886).

[15] Boggess v. Chesapeake & O. Ry., 37 W. Va. 297, 16 S. E. 525 (1892).

[16] Columbus, C. & I. C. Ry. v. Powell, 40 Ind. 37 (1872); Cincinnati, H. & I. R. R. v. Carper, 112 Ind. 26, 14 N. E. 352 (1887); Arnold v. Pennsylvania R. R., 115 Pa. 135, 8 Atl. 213, 6 Cent. 630 (1887).

TOPIC C—SPECIAL CLASSES OF PERSONS.

§ 152. Mail clerks and express messengers.

Mail agents or postal clerks and express messengers require to be carried in a special car, under special circumstances; and they are not strictly travellers, since they desire merely to do business on the railroad train. The carrier is therefore not bound to receive them as passengers, and it may make such arrangement as it pleases with regard to terms of carriage and liability for injury.[1]

If, however, mail clerks and express messengers are received and allowed to ride in baggage cars without special release of liability, they are entitled to the rights of passengers. They are, to be sure, carried in a different car from ordinary passengers, and to the extent to which it is dangerous to travel in such a car instead of the ordinary passenger car, the mail agent takes the risk of injury, but in all other respects the agent has the rights of an ordinary passenger.[2] The same thing is true of an express messenger. If he is being carried by the railroad in a special car, under the contract with the express company, he is

[1] Baltimore & O. v. Voight, 176 U. S. 498, 44 L. Ed. 560, 20 Sup. Ct. 385 (1900); Northern Pac. Ry. v. Adams, 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. 408 (1904); Bates v. Old Colony R. R., 147 Mass. 255, 17 N. E. 633 (1888); Hosmer v. Old Colony R. R., 156 Mass. 506, 31 N. E. 652 (1892); Louisville, N. A. & C. Ry. v. Keefer, 146 Ind. 21, 58 Am. St. Rep. 348, 38 L. R. A. 93, 44 N. E. 796 (1896). But see Pennsylvania R. R. v. Woodworth, 26 Ohio St. 585 (1875); Chamberlain v. Railroad, 11 Wis. 238 (1860).

[2] Collett v. London & N. W. Ry., 16 Q. B. 984 (1851); Arrowsmith v. Nashville & D. R. R., 57 Fed. 165 (1893); Cleveland, C. C. & S. L. Ry. v. Ketcham, 133 Ind. 346, 33 N. E. 116, 36 Am. St. Rep. 550, 19 L. R. A. 339 (1893); Mellor v. Missouri Pac. Ry., 105 Mo. 455, 14 S. W. 758, 10 L. R. A. 36 (1890); Nolton v. Western R. R., 15 N. Y. 444, 69 Am. Dec. 623 (1857); Seybolt v. New York, L. E. & St. R. R., 95 N. Y. 562, 47 Am. Rep. 75n (1884); Hammond v. North Eastern R. R., 6 S. C. 130, 24 Am. Rep. 467 (1874); Norfolk & W. R. R. v. Shott, 92 Va. 34, 22 S. E. 811 (1895).

a passenger, and is entitled to all the rights of a passenger, except so far as he accepts a risk of being carried in an express car.[3]

As in the preceding cases, the carrier, in making arrangements to have sleeping-car facilities for the public, may obtain an indemnity contract from the sleeping-car company and an exemption contract from the employes of the sleeper company.[4]

§ 153. Employes of the carrier.

The question has been much discussed whether a servant of the company who is being carried gratuitously is entitled to be regarded as a passenger. If the carriage is directly in connection with his work he is really, while being carried, engaged in his employment and his relation to the carrier is that of servant and certainly not that of a passenger; as where a workman on a construction or a gravel train is taken from place to place on the road, as his services are needed.[5] If he is not actually working at his employment, but is being carried to or from the place of employment, by agreement with the company, as an assistance

[3] Fordyce v. Jackson, 56 Ark. 594 (1891); Yeomans v. Contra C. S. Nav. Co., 44 Cal. 71 (1872); Union Pac. Ry. v. Nichols, 8 Kan. 505, 12 Am. Rep. 475 (1871) (*semble*); Ky. Cen. Railroad v. Thomas, 79 Ky. 160 (1880); Blair v. Erie Ry., 66 N. Y. 313, 23 Am. Rep. 55 (1876); Pennsylvania R. R. v. Woodworth, 26 Ohio St. 585 (1875); Chamberlain v. P. R. R., 11 Wis. 238 (1860).

[4] McDermon v. Railroad, 122 Fed. 669 (1893); Russell v. Railroad, 157 Ind. 305, 61 N. E. 678, 87 Am. St. Rep. 214 (1901); Chicago, R. I. & P. Railroad v. Hamlin, 114 Ill. App. 141, 215 Ill. 525, 55 N. E. 332 (1904); Blank v. Railroad, 182 Ill. 332, 55 N. E. 332 (1899).

[5] Travelers' Ins. Co. v. Austin, 116 Ga. 264, 42 S. E. 522 (1902); Evansville & R. R. R. v. Barnes, 137 Ind. 306, 36 N. E. 1092 (1894); Gilshannon v. Stony Brook R. R., 10 Cush. (Mass.) 228 (1852); Ryan v. Cumberland V. R. R., 23 Pa. St. 384 (1854); Benignia v. Pennsylvania R. R., 197 Pa. 384, 47 Atl. 359 (1900).

to his work, he would seem equally to be engaged in his employment, and not to be a passenger.[6]

If, however, he receives as a gratuity or in part compensation for his services the right to travel free in the conveyance of the carrier upon his own business then in so travelling he is to be regarded as in all respects a passenger.[7]

TOPIC D—CARRIAGE OBTAINED BY MISREPRESENTATION.

§ 154. Persons never accepted in a proper place not passengers.

If, however, a passenger is received by a servant of the carrier in a vehicle in which he knows that he has no right to ride, and that the conductor has no authority to permit him to ride,

[6] Holmes v. Great Northern Ry. (1900) 2 Q. B. 409; Tunney v. Midland Ry., L. R. 1 C. P. 291 (1866); Southern Ind. Ry. v. Mesick (Ind. App.) 74 N. E. 1097 (1905); Gilman v. Eastern R. R., 10 Allen (Mass.), 233, 87 Am. Dec. 635 (1865); O'Brien v. Boston & A. R. R., 138 Mass. 387, 52 Am. Rep. 279n (1885); Manville v. Cleveland & T. R. R., 11 Ohio St. 417 (1860). Though not a passenger, yet being rightfully on the train, he may recover compensation for an injury caused by actual negligence imputable to the carrier, unless he is barred by the fact that the negligence was that of a fellow servant. Evansville & R. R. R. v. Maddux, 134 Ind. 571, 33 N. E. 345 (1893); Dobson v. New Orleans & W. R. R., 52 La. Ann. 1127, 27 So. 670 (1900); Texas & P. Ry. v. Scott, 64 Tex. 549 (1885).

[7] State v. Western M. R. R., 63 Md. 433 (1884); Doyle v. Fitchburg R. R., 162 Mass. 66, 37 N. E. 770, 44 Am. St. Rep. 335, 25 L. R. A. 157 (1894); Dickinson v. West End St. Ry., 177 Mass. 365, 59 N. E. 60, 83 Am. St. Rep. 284, 52 L. R. A. 326 (1901); O'Donnell v. Allegheny V. R. R., 59 Pa. 239, 98 Am. Dec. 336 (1868); McNulty v. Pennsylvania R. R., 182 Pa. 479, 38 Atl. 524, 61 Am. St. Rep. 721, 38 L. R. A. 376 (1897); Peterson v. Seattle Traction Co., 23 Wash. 615, 43 Pac. 539 (1900). Pennsylvania R. R. v. Books, 57 Pa. 339, 98 Am. Dec. 229 (1868) which seem to hold that a servant riding on an employer's pass is not to be regarded as a passenger under any circumstances, must be considered overruled on that point; Higgins v. Hannibal & S. J. R. R., 36 Mo. 418 (1865), which holds that an employe riding free in a baggage car on his own business was not to be regarded as a passenger in the language of a statute giving damages for death, seems opposed to the others cited, and cannot be approved.

he does not become a passenger whether he pays fare or not; and so where the conductor informs him that passengers are forbidden to ride on a freight train, but he persuades the conductor to let him ride nevertheless, he is not a passenger.[1]

§ 155. Carriage of goods secured by fraud.

When the carriage of goods is secured by some fraud upon the carrier practiced by the shipper, the carrier does not occupy the position of a common carrier with regard to the goods. Thus, when one shipped a bag of money concealed in a bundle of hay and the money was lost, the carrier was held to be not responsible for the loss.[2] And in similar cases a carrier has been held not responsible for money hidden in package of tea;[3] or in boxes with household goods.[4] Perhaps another ground for resting the decision in cases of the kind just cited is that possession of the money hidden in the package was never taken by the carrier.

[1] *Indiana*—Stalcup v. Louisville, N. A. & C. Ry., 16 Ind. App. 584, 45 N. E. Rep. 802 (1897).

Kentucky—Ohio V. Ry. v. Watson, 93 Ky. 654, 21 S. W. 244, 40 Am. St. Rep. 211, 19 L. R. A. 310 (1893).

Maine—Dunn v. Grand Trunk Ry., 58 Me. 187, 4 Am. Rep. 267 (1870).

Massachusetts—Powers v. Boston & M. R. R., 153 Mass. 188, 26 N. E. 446 (1891).

New York—Eaton v. Delaware, L. & W. R. R., 57 N. Y. 382, 15 Am. Rep. 513 (1874).

Tennessee—Washburn v. Nashville & C. R. R., 3 Head (Tenn.) 638, 75 Am. Dec. 784 (1859); Louisville & N. R. R. v. Hailey, 94 Tenn. 383, 29 S. W. 367, 27 L. R. A. 549 (1895).

Texas—Houston & T. C. R. R. v. Moore, 49 Tex. 31, 30 Am. Rep. 98 (1878); Gulf, C. & S. F. Ry. v. Campbell, 76 Tex. 174, 13 S. W. 19 (1890).

Utah—Everett v. Oregon, S. L. & U. N. Ry., 9 Utah, 340, 34 Pac. 289 (1893).

Wisconsin—Lucas v. Milwaukee & St. Paul Ry., 33 Wis. 41, 14 Am. Rep. 735 (1873).

[2] Gibbon v. Paynton, 4 Burr. 2298 (1769).

[3] Bradley v. Waterhouse, 3 C. & P. 318 (1828).

[4] Chicago & A. R. R. v. Thompson. 19 Ill. 578 (1858).

Upon like principles it has often been held that if the goods are tendered in such a shape as to inevitably mislead the carrier in judging their character, then, there is not such acceptance as gives rise to the obligation which a common carrier owes a shipper. Thus, when goods of great value were sent in an ordinary package without declaring their nature, the carrier was not held liable for their value in case of loss.[5] And the same decision was reached where a box containing a diamond was given a mean appearance by the shipper.[6] So, where valuable laces and jewels were packed in ordinary dry goods boxes to look like merchandise the principle was held to apply.[7] And this was even held to extend to a case where valuable clothing was hidden in bedding.[8]

On the other hand if there is no apparent design to tender the goods in false dress, the obligation seems to be upon the carrier to inquire the value of the goods,[9] or their character.[10] But this principle obviously has no application to a case where a box containing jewels was marked "glass," [11] or where a very large sum of money was sent under circumstances indicating very little value.[12]

§ 156. Stealing a ride.

One who steals a ride upon a vehicle of the carrier, that is, conceals himself, intending to evade fare, is not to be regarded as a passenger,[13] and the same thing is true where a person gets

5 Batson v. Donovan, 4 B. & Ald. 21 (1820).
6 Southern Express Co. v. Everett, 37 Ga. 688 (1868).
7 Warner v. Western Transp. Co., 5 Robt. (La.) 490 (1868).
8 Chicago & A. R. R. v. Shea, 66 Ill. 471 (1873).
9 Phillips v. Earle, 8 Pick. (Mass.) 182 (1829).
10 Merchants' Desp. Co. v. Bolles, 80 Ill. 473 (1875).
11 Relf v. Rapp, 3 W. & S. (Pa.) 21 (1841).
12 Oppenheimer v. U. S. Exp. Co., 69 Ill. 62, 18 Am. Rep. 596 (1873).
13 State v. Baltimore & O. R. R., 24 Md. 94, 87 Am. Dec. 600 (1865); Huehlhausen v. St. Louis R. R., 91 Mo. 332, 2 S. W. 315 (1886); Chicago,

on board the carrier's vehicle, refuses to pay fare or to leave the vehicle, and succeeds in staying on the vehicle by force. In a case of this sort a person entered a stage-coach with a revolver and compelled the driver to allow him to ride without payment of fare. The coach broke down, and he was injured and sued for damages; but it was held that he was not a passenger and could not recover damages.[14]

So where a person is riding on a train, having used or intended to use a ticket which he knows he has no right to use, and concealing or intending to conceal that fact from the conductor, he is not to be regarded as a passenger, even if the conductor permits him to ride.[15] The consent of the conductor to accept the ticket is not material if the consent was obtained by fraud; though probably if knowing the facts the conductor allowed the substitution, the person so allowed to ride would be a passenger,[16] and clearly, if the carrier habitually permitted such substitution, in spite of the exact terms of the ticket, the person using it in accordance with the custom would be a passenger.[17]

A child travelling with an older person who refuses to pay his fare is not entitled to be regarded as a passenger.[18]

This doctrine seems unassailable, though the English Court of Queen's Bench refused to say that the fraud of the older per-

B. & Q. R. R. v. Mehlsack, 131 Ill. 61, 22 N. E. 812, 19 Am. St. Rep. 17 (1889); Planz v. Boston & A. R. R., 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835 (1892); Barry v. Union Ry. (N. Y. App. Div.), 94 N. Y. Supp. 449 (1905).

[14] Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450 (1878).

[15] Way v. Chicago, R. I. & P. Ry., 64 Ia. 48, 19 N. W. 82 (non-transferable mileage-book issued to another); Union Pac. Ry. v. Nichols, 8 Kan. 505 (1871) (fraudulent impersonation of express messenger); Toledo W. & W. R. R. v. Beggs, 85 Ill. 80 (1877) (non-transferable free pass issued to another).

[16] Way v. Chicago, R. I. & P. Ry., 64 Ia. 48, 19 N. W. 828, 52 Am. Rep. 431 (1884).

[17] Great Northern Ry. v. Harrison, 10 Exch. Rep. 376 (1854).

[18] Beckwith v. Cheshire R. R., 143 Mass. 68, 8 N. E. 875 (1886).

son would prevent the child becoming a passenger.[19] And where the older person *bona fide* fails to pay for the child, though under the rules of the company a fare is due from a child of that age the child has been held a passenger.[20]

§ 157. Riding on invalid ticket.

If, for instance, a person is riding on a non-transferable ticket, issued to another, though he succeeds in deceiving the conductor and is accepted by him as a passenger, he is not to be regarded as a passenger, and is not entitled to the rights of one.[21]

The business usage of the carrier may in this respect control even the clear language of the ticket, and make it permissible for a mere holder to ride on such a ticket. In an English case a reporter's pass was issued to a newspaper, containing the name of a reporter, and on its face not transferable. There was some evidence that the carrier was in the habit of allowing other reporters of the newspaper named to travel on such a pass. A reporter of the newspaper, but not the one named, was injured while travelling on the pass, and sued the railway, and the jury was told, if such a usage existed, to find that the plaintiff was a passenger. This direction was upheld in the Exchequer Chamber, Mr. Justice Coleridge saying: "We think the pass-ticket not so clear as to make the other circumstances wholly immaterial. The defendants might issue tickets in a form which did not permit others to use them, as being not transferable, and yet they might reasonably permit them to be used by other persons belonging to the same department, which permission would be a convenience to the newspaper proprietors, and a matter of in-

19 Blackburn, J., in Austin v. Great Western Ry., L. R. 2 Q. B. 442, 446 (1867).

20 Austin v. Great Western Ry., L. R. 2 Q. B. 442 (1867).

21 Way v. Chicago, R. I. & P. Ry. Co., 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431 (1884); Toledo, W. & W. R. R. v. Beggs, 85 Ill. 80 (1877).

difference to themselves. If the jury were of opinion that this irregular use of tickets, however worded, was with the knowledge and permission of the superintendents of the station, who are placed there to regulate such matters, this would be such evidence of a license as would make it wrong to say the plaintiff was a trespasser in the carriage." [22]

§ 158. Attempt to escape conductor's notice.

It sometimes happens that a person enters a carrier's vehicle prepared to pay fare if it is demanded, but hoping to escape the notice of the conductor and so avoid paying fare. It is hard to see how this form of fraud differs from that of a person riding on a non-transferable ticket issued to another; and the better view would seem to be that such a person is not a passenger until by paying his fare he is received as such by express consent of the conductor. Before being so expressly received, he can make himself out a passenger only by bringing himself within the terms of the invitation; and no invitation is extended to persons to enter the vehicle and try to "beat" the company. In a New York case, however, this view was not taken. It appeared in that case that the plaintiff had paid her fare, and taken passage on a ferryboat across a river, but on arriving at the other side, instead of leaving the boat, had crossed back again, without the payment of an additional fare. It was assumed that the fare paid on entering the boat covered only a single passage. It was held that since she did not attempt to conceal herself on the boat she was a passenger on the return trip. The court said: "She remained on the boat; did not go ashore, so as to pass through the gate at the landing. The employes of the company saw her there, and it was their business to demand her fare, if they intended to charge her. Their doing so would not render her liable to be held guilty of negligence, or of being carried

[22] Great Northern Ry. v. Harrison, 10 Ex. 376 (1854).

gratuitously, so as not to render the company liable for damages arising through negligence on their part."[23]

However that may be, it is clear that if the traveller in such a case takes any step to conceal himself from the conductor he will not become a passenger. In one case of this sort it appeared that two persons were shipping horses over a railroad, and that by the laws of the road, as they knew, only one person was entitled to be carried free with the horses. A drover's ticket was issued to one of them. The other also entered the stock car with the horses, having no ticket, but afterwards asserted that he was ready to pay his fare upon demand. The conductor would not ordinarily come to a stock car to collect fares from passengers. The court held, and it would seem rightly, that the person riding without a ticket was not a passenger.[24] The general question whether a person riding without a ticket but expressing his readiness to pay fare if called upon is a passenger or not is a question of fact.

§ 159. Riding free by connivance of the conductor.

One who is on the carrier's vehicle not by any arrangement with the carrier, but by the connivance of the conductor, for the purpose of selling newspapers or other articles to the passengers, is not in any sense a passenger, and is entitled to little more care than a trespasser.[25] "A newsboy jumping on and off a moving street car to sell his newspapers; not hailing to stop the car to receive him, nor signaling to stop to allow him to alight; not asking nor receiving permission, either express or tacit; not asking nor waiting for leave or license, but jumping on and off under circumstances that clearly indicate no purpose to pay

[23] Barnard, J., in Doran v. East River Ferry Co., 3 Lans. (N. Y.) 105 (1870).

[24] Gardner v. New Haven & N. R., 51 Conn. 143, 50 Am. Rep. 12 (1883).

[25] Duff v. Alleghany V. R. R., 91 Pa. 458 (1879); Griswold v. New York & N. E. R. R., 53 Conn. 371, 55 Am. Rep. 115 (1885); Padgitt v. Moll, 159 Mo. 143, 60 S. W. 121 (1900).

fare, and no aim to be transported, but only to avail himself of the presence of persons on the car likely to buy his papers,—is in no sense a passenger, and the carrier is not under obligation to observe towards him the same degree of care that the law requires to be observed towards a person in the hands of the carrier to be transported. But the law does require of the carrier, under such circumstances, the exercise of ordinary care."[26]

So where a person on a train induces the conductor out of charity[27] or by misrepresentation, to allow him to ride free, such a person is not a passenger. "It is manifest that if a person were stealthily, and wholly without the knowledge of any of the employes of the company, to get upon a train and secrete himself, for the purpose of passing from one place to another, he could not recover if injured. In such a case his wrongful act would bar him from all right to compensation. Then, does the act of the person who knowingly induces the conductor to violate a rule of the company, and prevails upon him to disregard his obligations to fidelity to his employer, to accomplish the same purpose, occupy a different position, or is he entitled to any more rights? He thereby combines with the conductor to wrong and defraud his employer out of the amount of his fare, and for his own profit." [28]

§ 160. Guest of a servant of the carrier.

One who is riding in the carrier's vehicle, not as ordinary passengers ride, but upon invitation of the carrier's servant, without paying fare, is not a passenger; his relation is with the servant, not with the carrier.[29]

[26] Berry v. Union Ry., 105 App. Div. 520, 94 N. Y. Supp. 449 (1905).

[27] Toledo, W. & W. R. R. v. Brooks, 81 Ill. 245 (1876).

[28] Atchison, T. & S. F. R. R. v. Headland, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822 (1893). See, also, Condran v. Chicago, M. & S. P. Ry., 67 Fed. 522, 14 C. C. A. 506, 32 U. S. App. 182 (1895).

[29] Waterbury v. New York C. & H. R. R. R., 17 Fed. 671 (1883) (riding on engine by consent of engineer); Atchison, T. & S. F. R. R. v.

Thus, where a yardmaster out of hours took an engine and car without permission of the defendant company, and invited persons to ride free in the car to a meeting, over a portion of the road not used for passenger trains, he was held not to have even apparent authority to act for the company, and the persons so riding were not passengers.[30] And where a party of children were invited by a servant of the carrier to ride on a train which was being shifted through the yard, they were not passengers.[31]

In a few cases, however, it has been held that children riding on a vehicle by invitation of a servant of the company are entitled to be regarded as passengers. Thus, where the driver of a stret car invited children to ride on the front platform, they were held to be passengers;[32] and where a conductor invited a boy to ride in a freight train (on which passengers were sometimes carried) the boy was held to be a passenger.[33] But these cases can hardly be supported on this point. The children con-

Headland, 18 Col. 477, 33 Pac. 185, 20 L. R. A. 822 (1893) (conductor induced to let plaintiff ride free on freight train); Toledo, W. & W. Ry. v. Brooks, 81 Ill. 245 (1876) (conductor induced to let plaintiff ride free on passenger train); Chicago & A. R. R. v. Michie, 83 Ill. 427 (1876) (riding on engine by consent of engineer); McVeety v. St. Paul, M. & M. Ry., 45 Minn. 268, 47 N. W. 809, 22 Am. St. Rep. 728, 11 L. R. A. 174 (1891); (riding free on freight train); Woolsey v. Chicago, B. & Q. R. R., 39 Neb. 798, 58 N. W. 444, 25 L. R. A. 79 (1894) (riding on engine by consent of fireman, to shovel coal); Robertson v. New York & E. R. R., 22 Barb. (N. Y.) 91 (1856) (riding on engine by consent of engineer).

30 Chicago, S. P. & O. Ry. v. Bryant, 65 Fed. 969, 13 C. C. A. 249 (1895).

31 Reary v. Louisville, N. O. & T. Ry., 40 Lt. Ann. 32, 3 So. 390, 8 Am. St. Rep. 497 (1888).

32 Wilton v. Middlesex R. R., 107 Mass. 108 (1871); Muehlhausen v. St. Louis R. R., 91 Mo. 332, 2 S. W. 315 (1886); Buck v. Power Co., 108 Mo. 185, 18 S. W. 1090 (1892).

33 St. Joseph & W. R. R. v. Wheeler, 35 Kan. 185, 10 Pac. 461 (1886); Sherman v. Hannibal & S. J. R. R., 72 Mo. 62, 37 Am. Rep. 423 (1880), (*semble*); Whitehead v. St. Louis, I. M. & S. Ry., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409 (1889).

cerned were clearly guests of the servant, not of the carrier. However far the apparent authority of a conductor may be held to extend, it cannot cover an invitation to ride free; free carriage is not the carrier's business.

If one riding free by invitation of a servant is not a passenger, *a fortiori* one who by misrepresentation induces the servant to let him ride free is not a passenger;[34] and still more clearly one who bribes the servant by a small fee to let him ride without paying the regular fare is not a passenger.[35]

[34] Condran v. Chicago, M. & S. P. Ry., 67 Fed. 522, 14 C. C. A. 560, 32 U. S. App. 182 (1895).

[35] McNamara v. Great Northern Ry., 61 Minn. 296, 63 N. W. 726 (1895); Janny v. Great Northern Ry., 63 Minn. 380, 65 N. W. 450 (1896); Brevig v. Chicago, S. P. M. & O. Ry., 64 Minn. 168, 66 N. W. 401 (1896).

CHAPTER VI.

ENUMERATION OF THE COMMON CARRIERS.

§ 171. Varieties of common carriers.

TOPIC A—CARRIERS OF GOODS.

§ 172. Pack carriers.
173. Wagoners.
174. Hoymen.
175. Ships.
176. Canal boats.
177. Steamboats.
178. Railways.
179. Draymen.
180. Transfer companies.
181. Express companies.
182. Dispatch companies.
183. Messenger companies.
184. Towboats.

TOPIC B—CARRIERS OF PASSENGERS.

§ 185. Ferrymen.
186. Stage coaches.
187. Hackmen.
188. Street railways.
189. Passenger elevators.
190. Pleasure railways.

§ 171. Varieties of common carriers.

In the chapters immediately preceding this the principal factors necessary for the establishment of common carriage have been discussed. In this chapter it is thought advisable to enumerate the different kinds of common carriers which are recognized as meeting those tests. This seemed necessary as the principal problem for discussion throughout this volume is the regulation

not only of railroad rates, but so far as there are decided cases, of the rates of all common carriers for transportation and incidental services. In classifying these varieties of common carriers the traditional division is made between carriers of goods and carriers of passengers, but this is obviously not entirely workable since many carriers, and the railways in particular, are usually carriers both of goods and of passengers.

Topic A—Carriers of Goods.

§ 172. Pack carriers.

The earliest form of common carriage in England was by means of pack horses. The country roads were not adapted for wheeled vehicles, and the carrier was obliged to carry his goods on the horses' backs in panniers. Such were the two carriers who appear in the first part of Shakespeare's Henry IV.[1] One of them had "a gammon of bacon and two razes of ginger to be delivered as far as Charing-cross," while the other had turkeys in his pannier. Such also was the carrier who took certain bales to carry to Southampton, and by breaking open the bales and stealing the contents provided a leading case in the law of larceny.[2]

§ 173. Wagoners.

As the roads grew better and traffic between different parts of the country consequently increased, goods began to be carried in wagons; and the common carrier by land was a wagoner or carter. This continued to be the common method of land carriage of goods down to the invention of railroads, and such carriers might unquestionably be common carriers.[3]

[1] Act II, scene 1.

[2] Year Book, 13 Edw. iv, 9, pl. 5 (1473).

[3] *Georgia.*—Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393 (1847).
Illinois.—Parmalee v. Lowrtz, 74 Ill. 116, 24 Am. Rep. 276 (1874).

§ 174. Hoymen.

As in the case of land carriage, so in the case of water carriage, there are carriers who do not ply regularly between fixed termini, but carry for those who employ them anywhere on a certain river or within a certain harbor. Such persons are ordinary carriers, at least, though whether they are common carriers or not may depend upon the nature of their profession. If however the lighterman does not take the goods, but they remain in the control and possession of the owner, the lighterman is to be regarded as merely furnishing the motive power; not taking possession he cannot be technically a carrier.[4]

§ 175. Ships.

That there was no essential difference between carriage by land and carriage by sea was established at a comparatively early day. Hale v. New Jersey Navigation Company,[5] is an excellent summary of the matter. The suit was brought against the defendants, as common carriers, for two carriages shipped on board the "Lexington," to be transported in said boat, for hire, from New York to Boston or Providence. The boat and goods were destroyed by fire, in the Sound; and a verdict was given for the plaintiff, the defendants excepted to the charge, and claimed that they were not common carriers or sub-

Kentucky.—Robertson v. Kennedy, 2 Dana (Ky.), 430, 26 Am. Dec. 466 (1834).

Mississippi.—Harrison v. Roy, 39 Miss. 396 (1860).

Ohio.—Samms v. Stewart, 20 Ohio St. 69, 55 Am. Dec. 393 (1847).

Pennsylvania.—Gordon v. Hutchinson, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464, B. & W. 3 (1841).

Texas.—Chevallier v. Strahan, 2 Tex. 115, 47 Am. Dec. 639n (1849).

England.—Gisbourn v. Hurst, 1 Salk. 249 (1710).

[4] Liver Alkali Co. v. Johnson, L. R. 9 Exch. 338 (1874); Ingate v. Christie, 3 C. & K. 61, B. & W. 7 (1850); Maring v. Todd, 4 Campb. 225, 1 Starkie, 72 (1815); Dale v. Hall, 1 Wils. Chan. 281 (1750); Trent., etc., Nav. Co. v. Wood, 4 Dougl. 287, 3 Esp. 127, 1 T. R. 28 note (1785).

[5] 15 Conn. 539, 39 Am. Dec. 398 (1843).

ject to the rules that govern common carriers. Mr. Justice Williams said: "It was long since settled that any man undertaking for hire to carry the goods of all persons indifferently, from place to place, is a common carrier. Common carriers, says Judge Kent, consist of two distinct classes of men, viz., inland carriers by land or water, and carriers by sea; and in the aggregate body are included the owners of stage-coaches, who carry goods, as well as passengers for hire,—wagoners, teamsters, cartmen, the masters and owners of ships, vessels and all water-craft, including steam vessels and steam towboats belonging to internal as well as coasting and foreign navigation, lightermen and ferrymen. And there is no difference between a land and a water carrier." [6]

§ 176. Canal boats.

Transportation over most canals has been largely carried on from the time of their first construction to the present day by canal boatmen who take possession of the goods to be forwarded, store them in their canal boats, keep charge over them

[6] *United States.*—Propeller Niagara v. Cordes, 21 How. 7, 16 L. Ed. 41 (1858); Clark v. Barnwell, 12 How. 272, 13 L. Ed. 985 (1851); The Delaware, 14 Wall. 579, 20 L. Ed. 779 (1871); The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772 (1869); The Gold Hunter, 1 Blatchf. & H. (U. S.) 300, 10 Fed. Cas. 5,513 (1832); The Montana, 22 Blatchf. (U. S.) 372, 22 Fed. 715 (1884).

Connecticut.—Hale v. New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398 (1843); Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745 (1838).

Georgia.—Brown v. Clayton, 12 Ga. 564 (1853); Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393 (1847).

Massachusetts.—Hastings v. Pepper, 11 Pick. 41 (1831); Gage v. Tirrell, 9 Allen, 299 (1864).

New York.—Orange Bank v. Brown, 3 Wend. 158 (1829); Allen v. Sewall, 2 Wend. 327 (1829); Elliott v. Rossell, 10 Johns. 1, 6 Am. Dec. 306 (1813).

South Carolina.—Swindler v. Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732 (1845).

England.—Laveroni v. Drury, 8 Exch. 166, 16 Eng. L. & E. 510 (1854).

during the transit, and make provision for the beasts of burden by which the boats are usually hauled from point to point. Obviously this business is carriage, and if it is professed for all that apply it is common carriage, and subject to all the liabilities of common carriage.[7]

§ 177. Steamboats.

The invention of the application of steam propulsion to vessels did not alter the rule already established that those who carry goods and passengers as a general business by any vehicles or vessels are common carriers. The business is therefore public in character, provided that those who conduct it profess to serve all that apply, which may be established by the usual tests already discussed. A few representative cases are collected in the footnote. Steamboats, of course, are carriers of both goods and passengers usually.[8]

[7] *New York.*—Demott v. Larauay, 14 Wend. 225 (1835); Parsons v. Hardy, 14 Wend. 215 (1835); Bowman v. Teal, 23 Wend. 306 (1840); Fish v. Clark, 49 N. Y. 122 (1872).

North Carolina.—Williams v. Branson, 1 Murphy (N. C.), 417 (1810).

Pennsylvania.—Humphreys v. Reed, 6 Whart. 435 (1841); Fuller v. Bradley, 25 Pa. St. 120 (1855).

South Carolina.—Harrington v. Lyles, 2 Nott & McCord (S. C.), 88 (1819).

Vermont.—Spencer v. Daggett, 2 Vt. 92 (1829).

England—Hyde v. Trent Nav. Co., 5 T. R. 389 (1793); Trent Nav. Co. v. Wood, 3 Esp. 127 (1785).

[8] *United States.*—The Commander in Chief, 1 Wall. 43, 17 L. Ed. 609 (1863); Jenks v. Coleman, 2 Sumner, 221, Fed. Cas. 7,258 (1835); Citizen's Bk. v. Nantucket Steamboat Co., 2 Story, 16, B. & W. 8, Fed. Cas. 2,730 (1841); Sch'r Emma Johnson, 1 Sprague 527, Fed. Cas. 4,465 (1860).

Alabama.—Jones v. Pitcher, 3 Stew. & P. (Ala.) 136 (1833).

Connecticut.—Crosby v. Fitch, 12 Conn. 410 (1838).

Florida.—Bennett v. Filyaw, 1 Fla. 403 (1847).

Illinois.—Dunseth v. Wade, 2 Scam. (Ill.) 285 (1840).

Louisiana.—Oakey v. Russell, 18 Mar. (La.) 58 (1827).

Maine.—Parker v. Flagg, 26 Me. 181 (1846).

Massachusetts.—Hastings v. Pepper, 11 Pick. 41 (1838).

§ 178. **Railways.**

It is a matter of history that where the first railways were laid down at the beginning of the nineteenth century the theory upon which they were constructed was that they would be public highways, for the use of which those that drove their vehicles over them should pay toll as for the use of a turnpike or a canal. The introduction of the steam locomotive brought about the end of that theory almost before it was put into practice. A train drawn by a locomotive was too expensive, the operation was too costly, and its management too intricate for any shipper, or even for any private carrier. Almost from the outset, therefore, the railway company provided and operated the engines and cars themselves, and accepted for transportation such goods as were offered.

They thus became common carriers. The cases that hold this form so enormous a list that it is difficult to select any one in particular as an illustration. Perhaps the case of Southwestern Railroad Co. v. Webb [9] involves as fundamental an issue as any. This was an action against the railroad company for loss of certain bales of cotton which it was alleged had been received by it as a common carrier. Mr. Justice Peters began his opinion with the recitation of certain principles which he held to be fundamental as to the business of railroading; he said: "It is now too well settled in this State to admit of question, that rail-

Mississippi.—Gilmore v. Carman, 1 Sm. & M. 279 (1843).

New York.—Hollister v. Nowlen, 19 Wend. 234 (1838); Cole v. Goodwin, 19 Wend. 251 (1838); McArthur v. Sears, 21 Wend. 190 (1839); Pardee v. Drew, 25 Wend. 459 (1841).

Ohio.—McGregor v. Kilgore, 6 Ohio, 359 (1834); Bowman v. Hilton, 11 Ohio, 303 (1842).

Pennsylvania.—Hart v. Allen, 2 Watts (Penn.), 114 (1833); Harrington v. McShane, 2 Watts (Penn.), 443 (1834).

South Carolina.—Faulkner v. Wright, Rice (Law), 107 (1838); McClure v. Hammond, 1 Bay, 99 (1860).

Tennessee.—Kirkland v. Montgomery, 1 Swan, 452 (1852); Porterfield v. Humphreys, 8 Humphr. 497 (1847).

[9] 48 Ala. 585 (1872).

road companies are common carriers, and as such, that they are amenable to the liabilities imposed by the law applicable to common carriers as the same is administered in this State. There is no question made in this court as to the place of making the contract of transportation, or undertaking the duty to transport. The proceeding will then be treated as a transaction governed by the common law applicable to common carriers. The suit here is against the corporation only as a common carrier, and not as a warehouse keeper or a common bailee of goods and chattels delivered, to be safely kept for shipment. And the dominent question in the case is, when does the liability of the railroad company for transportation of goods and other articles to be carried on this road begin? Certainly just where that of any other common carrier's liability would begin; that is, as soon as the goods are delivered and received for transportation."

The same view has been taken in all the cases in which the question has been raised. A few cases where the language is especially clear are subjoined.[10]

[10] See, for examples:

United States.—Railroad v. Lockwood, 17 Wall. 357, 21 L. Ed. 627 (1873).

Alabama.—South-Western R. Co. v. Webb, 48 Ala. 585 (1872); Selma, etc., R. Co. v. Butts, 43 Ala. 385, 94 Am. Dec. 641 (1869).

California.—See Costa, etc., R. R. v. Moss, 23 Cal. 323 (1863); Tarbell v. Cent. Pac. R. Co., 34 Cal. 616 (1868).

Connecticut.—Fuller v. The Railway, 21 Conn. 557 (1852).

Georgia.—East Tenn., etc., R. Co. v. Whittle, 27 Ga. 535, 73 Am. Dec. 741 (1859).

Illinois.—Chicago, etc., R. R. v. Thompson, 19 Ill. 578 (1858); Ill. Cent. R. R. v. Faulkenberg, 54 Ill. 88, 5 Am. Rep. 92 (1870); Toledo, etc, R. Co. v. Pence, 68 Ill. 524 (1873).

Indiana.—Bansemer v. Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367 (1865).

Massachusetts.—Norway Plains Co. v. Boston & Me. R. R., 1 Gray, 233, 61 Am. Dec. 423 (1854).

New Hampshire.—Elkins v. Boston & M. R. R., 23 N. H. 275 (1851).

New Jersey.—Rogers Locomotive Works v. Erie R. R., 5 C. E. Green (N. J.), 379 (1869).

§ 179. Draymen.

Whether a truckman or drayman, who makes a business of carrying for any person who employs him between one part of a city and another, is a common carrier, is a question of some difficulty, and may have to be determined upon the facts of each case;[11] but there can be, of course, no doubt that he is a carrier essentially as he both takes possession of the goods of his patrons and transports them.[12]

§ 180. Transfer companies.

The omnibus lines that transfer passengers and their baggage across cities to their destinations are obviously within the same general classification as the instances now under discussion. A square case in point is Parmelee v. McNulty.[13] One of the counts in the declaration was against the defendants upon the custom as common carriers for the loss of a trunk or valise, to-

New York.—Heineman v. Grand Trunk R. R. Co., 31 How. Pr. 430 (1866); Root v. The Great N. R. R., 45 N. Y. 524 (1871).

Tennessee.—East Tenn., etc., R. R. v. Nelson, 1 Cold. 272 (1860).

Vermont.—Jones v. The Western Vt. Railroad, 27 Vt. 399 (1855); Noyes v. Railroad, 27 Vt. 110 (1854).

West Virginia.—Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748 (1878).

[11] See § 119, *supra.*

[12] *Delaware.*—McHenry v. Philadelphia, W. & B. Ry., 4 Harr. (Del.) 448 (1846).

Georgia.—Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393 (1847).

Indiana.—Powers v. Davenport, 7 Blackf. 497 (1845).

Kentucky.—Róbertson v. Kennedy, 2 Dana (Ky.), 430, 26 Am. Dec. 466 (1834); Cayo v. Pool, 21 Ky. L. Rep. 1600, 55 S. W. 887, 49 L. R. A. 251 (1900); Farley v. Lavary, 21 Ky. L. Rep. 1252, 54 S. W. 840, 47 L. R. A. 383 (1900).

New York.—Robinson v. Cornish, 13 N. Y. Supp. 577 (1890); Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432 (1899).

England.—Scaife v. Farrant, L. R. 10 Ex. 358 (1875); Culver v. Lester, 37 Can. L. J. (N. S.) 421 (1881).

[13] 19 Ill. 556 (1858).

gether with its contents. The plaintiff introduced evidence tending to show the delivery of the article to the agents of the omnibus line, and proffered in evidence a check for the baggage signed by the defendants as proprietors of the omnibus line.

It was properly held that the defendants were chargeable as common carriers. The opinion of Mr. Chief Justice Caton on that point was as follows: "It is further objected that the court assumed that Parmelee was a common carrier, without proof of that fact. The proof showed that he was the owner of an omnibus line, to the agents of which the proof tended to show the trunk was delivered. The court was authorized to take notice that the owner of an omnibus line is a common carrier, just as much as the owner of a railroad or of a line of steamboats.. The court will take notice of the general meaning of words; and we know that an omnibus line means a line of coaches for the carriage of passengers and their baggage. If this line was established for other purposes, that should have been shown in defense." [14]

§ 181. Express companies.

The business of transporting small or valuable goods has come largely into the hands of express companies. So far as such companies merely transmit parcels locally in their own teams, they are evidently carriers. The more important work of the companies, however, is done in connection with the carriage of parcels over a long distance over the lines of railways or steamboats. The express company has at the place of departure a local agent who receives the parcel for transmission; it is then transported over the line of a railway or steamboat, but always

[14] Acc. Verner v. Sweitzer, 32 Pa. St. 208 (1858); Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460 (1852); Parmelee v. Lowitz, 74 Ill. 116, 24 Am. Rep. 276 (1874); Parmelee v. McNulty, 19 Ill. 556 (1858); Cole v. Goodwin, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455 (1838); Jones v. Voorhees, 10 Ohio, 145 (1840); Beckman v. Shouse, 5 Rawle (Penn.), 179, 28 Am. Dec. 653 (1835).

in a part of the train or boat set aside for the express company, and at all times in the control and care of an agent of the company; and upon the arrival of the train or boat at the place of destination the parcel is taken by a local agent and by him delivered to the consignee.

The express company in such a case claims that it is not a carrier; that it merely relieves the shipper of the labor of finding and contracting with a carrier; in short, that it is only a forwarding agent. In the leading case of Buckland v. Adams Express Company[15] this contention was made in elaborate form. It was urged that persons exercising the employment of express carriers or messengers over railroads and by steamboats cannot, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them nor subject to their direction or supervision; and that the rules of common law, regulating the duties and liabilities of carriers, having been adapted to a different mode of conducting business, by which the carrier was enabled to select his own servants and vehicles and to exercise a personal care and oversight of them, are wholly inapplicable to a contract of carriage by which it is understood between the parties that the service is to be performed, in part, at least, by means of agencies over which the carrier can exercise no management or control whatever.

But Mr. Justice Bigelow said: "We are unable to see any valid reason for the suggestion that the defendants are not to be regarded as common carriers. The name or style under which they assume to carry on their business is wholly immaterial. The real nature of their occupation and of the legal duties and obligations which it imposes on them is to be ascertained from a consideration of the kind of service which they hold themselves

[15] 97 Mass. 124, 93 Am. Dec. 68, B. & W. 135 (1867).

out to the public as ready to render to those who may have occasion to employ them. Upon this point there is no room for doubt. They exercise the employment of receiving, carrying, and delivering goods, wares, and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume entire possession and control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it. The statement embraces all the elements essential to constitute the relation of common carriers on the part of the defendants towards the persons who employ them."

This case has been universally followed, and the express company held to be a common carrier of goods.[16]

[16] *United States.*—Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872; Missouri, K. & T. Ry. v. Dinsmore, 108 U. S. 30, 27 L. Ed. 640, 2 Sup. Ct. 9 (1884), reversing s. c. 10 Fed. 210; The Express Cases, 117 U. S. 1, 29 L. Ed. 791 (1886); Southern Exp. Co. v. St. Louis, I. M. & So. R. Co., 3 McCrary, 872 (1876), 10 Fed. 210, Final Decree, 10 Fed. 869 (1882); United States v. Pacific Exp. Co., 15 Fed. 867 (1883).

Alabama.—Southern Express Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140 (1870); Southern Express Co. v. Hess, 53 Ala. 19 (1875).

Colorado.—Overland Express Co. v. Carroll, 7 Col. 43 (1883).

District of Columbia.—Galt v. Adams Express Co., MacArthur and M. 124, 48 Am. Rep. 742 (1879).

Florida.—Southern Express Co. v. Van Meter, 17 Fla. 783 (1880).

Georgia.—Southern Express Co. v. Newbry, 36 Ga. 635, 91 Am. Dec. 783 (1867).

Illinois.—Gulliver v. Adams Express Co., 38 Ill. 503 (1865); Boscowitz v. Adams Express Co., 93 Ill. 523 (1879).

Indiana.—American Express Co. v. Hockett, 30 Ind. 250, 95 Am. Dec. 691 (1868); United States Express Co. v. State, 164 Ind. 196, 73 N. E. 101 (1905).

Kansas.—Adams Exp. Co. v. McConnell, 27 Kans. 238 (1882).

Massachusetts.—Mather v. American Express Co., 138 Mass. 55 (1884).

Michigan.—United States Exp. Co. v. Root, 47 Mich. 231, 10 N. W. 351 (1881).

Minnesota.—Christenson v. American Express Co., 15 Minn. 270, 2 Am. Rep. 122 (1870); Bardwell v. American Express Co., 35 Minn. 344, 28 N. W. 925 (1886).

§ 182. Dispatch companies.

The same question came up several times for decision in regard to the fast freight lines or dispatch companies. These lines again claimed that they were forwarders only and not carriers at all; but the courts held consistently that as they took possession they were carriers, and that as they professed a common calling they were common carriers. One representative case where these companies were charged as common carriers will do for all—Transportation Company v. Bloch Brothers.[17]

In that case Mr. Justice Caldwell said: "This instruction properly treats the defendant as a common carrier. The duties which it undertakes, and which it holds itself out to the public as willing to undertake and perform, give it that character. In very many cases it has been expressly adjudged to be a common carrier, and in others such has been assumed to be its character without a discussion of the question. The text-writers say that despatch companies are common carriers, and class them with express companies because of the many points of similarity in

Missouri.—Kirby v. Adams Express Co., 2 Mo. App. 369 (1876).

New York.—An earlier N. Y. case contra is overruled; in Hersfield v. Adams, 19 Barb. 577 (1855); Place v. Union Express Co., 2 Hilt. 19 (1858); Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575 (1872); Landsberg v. Dinsmore, 4 Daly, 490 (1873).

Ohio.—United States Express Co. v. Backman, 28 Ohio St. 144 (1875); American Express Co. v. Smith, 33 Ohio St. 511 (1878); Bernstine v. Union Exp. Co., 40 Ohio St. 451 (1884).

Oregon.—Bennett v. Northern Exp. Co., 12 Ore. 49 (1885).

Pennsylvania.—Grogan v. Adams Exp. Co., 114 Pa. St. 523 (1886); Union Express Co. v. Ohleman, 92 Penn. St. 323 (1879).

South Carolina.—Stadhecker v. Combs, 9 Rich. Law, 193 (1856).

Tennessee.—Southern Exp. Co. v. Wormack, 1 Heisk. 256 (1870).

Texas.—Pacific Exp. Co. v. Darnell, 62 Texas, 639 (1884).

Vermont.—Hadd v. United States Exp. Co., 52 Vt. 335 (1880).

Wisconsin.—Wells v. American Exp. Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441 (1882).

[17] 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881 (1888).

their business, and the fact that they alike generally use the vehicles of others in the transportation of freight." [18]

§ 183. Messenger companies.

It would seem plain that the city messenger companies are common carriers of the letters and parcels taken by their employees for their patrons and should be held liable as such for losses, unless there is some special arrangement. As was said in a recent case: [19] "In general this liability is found to attach because such companies hold themselves out as ready to conduct the business of carrying parcels, as well as letters or messages, and thus induce the public to intrust the carriage of such parcels to them. In the present case, if the defendant is to be held at all as a common carrier, it can only be because it has offered its service and held itself out as such; because there is no evidence whether or not such business is covered by its charter, and its title would seem to indicate that it was organized as a telegraph company, and not as a messenger company. It is in evidence, however, that it installs call boxes in houses and sends messenger boys, in response to calls, to carry out such errands as may be intrusted to them, and that this service frequently involves, to the knowledge of the company, the carrying of parcels. So far as appears, this service is confined to the carrying of such small parcels as can be carried by hand by a lad, and it does not appear that the defendant is equipped or prepared to carry more bulky merchandise. To the extent, then, that it offers its services to the public as a carrier, that is, so far as relates to small

[18] *Colorado.*—Merchants Dispatch Co. v. Cornforth, 3 Colo. 280 (1877).

Illinois.—Merchants Dispatch Co. v. Bolles, 80 Ill. 473 (1875); Merchants Dispatch Co. v. Leysor, 89 Ill. 43 (1878); Merchants Dispatch Co. v. Joesting, 89 Ill. 153 (1878).

Iowa.—Robinson v. Merchants Dispatch Co., 45 Iowa, 470 (1877); Stewart v. Merchants Dispatch Co., 47 Iowa, 229 (1877); Wilde v. Merchants Dispatch Co., 47 Iowa, 247 (1877); Bancroft v. Merchants Dispatch Co., 47 Iowa, 262 (1877).

[19] Gilman v. Postal Tel. Co., 48 Misc. (N. Y.) 372, (1905).

packages, the defendant must, I think, be regarded as a common carrier, and held to be responsible in that capacity. The parcel intrusted to defendant's messenger in that case was a small one, in general appearance such as could easily be carried by hand, even by a small boy." [20]

§ 184. Towboats.

To what extent towboats are engaged in a public employment is a vexed question; but the difficulty seems to be more on the determination of the question of fact in the cases that arose than of difference upon the legal possibilities. One of the principal cases is Bussey & Co. v. Mississippi Valley Transportation Co.[21] The regular business of the defendants in that case was proved to be the towing of barges upon the route between St. Louis and New Orleans. One such barge, belonging to the plaintiff, was lost while being towed under these circumstances. The suit of the plaintiff charged the defendants as common carriers.

The court reviewed the authorities bearing upon the point; the opinion of Mr. Justice Howe concluding much as follows: "Such conflict of authority might be very distressing to the student, but for the fact that when these writers and cases cited by them are examined the discrepancy is more imaginary than real. There are two very different ways in which a steam towboat may be employed, and it is likely that Mr. Story was contemplating one method and Mr. Kent the other. In the first place it may be employed as a mere means of locomotion under the entire control of the towed vessel; or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported to the exclusion of the bailee;

[20] Sandford v. Am. Dist. Tel. Co., 13 Misc. (N. Y.) 88, 34 N. Y. Supp. 144 (1895); Hirsch v. Am. Dis. Tel. Co., 48 Misc. (N. Y.) 370, 96 N. Y. Supp. 1129 (1905), *accord*.

Haskell v. Boston Dist. Mess. Co., 76 N. E. 215 (1906); Hirsch v. Am. Dis. Tel. Co., 98 N. Y. Supp. 371 (1906), *contra*.

[21] 24 La. Ann. 165, 13 Am. Rep. 125, B. & W. 16 (1872).

or the towing may be casual merely, and not as a regular business between fixed termini . . . It might well be said that under such circumstances the towboat or tug is not a common carrier. But a second and quite different method of employing a towboat is where she plies regularly between fixed termini, towing for hire and for all persons, barges laden with goods, and taking into her full possession and control, and out of the control of the bailor the property thus transported. Such is the case at bar. It seems to satisfy every requirement in the definition of a common carrier. We must think that in all reason the liability of the defendants under such circumstances should be precisely the same as if, the barge being much smaller, it had been carried, cargo and all, on the deck of their tug."

If, therefore, the towboat really makes a business of carrying, that is, if it actually takes control of the barges towed and itself transports them, the towboat is a common carrier.[22]

If, on the other hand, the towboat simply furnishes the motive power, the vessel towed remaining at all times under the control of her own officers, there is no bailment of the vessel or its contents to the towboat, and the towboat is therefore not a carrier.[23]

[22] White *v.* Mary Ann, 6 Cal. 462 (1856); Smith v. Pierce, 1 La. 349 (1830); Clapp v. Stanton, 20 La. Ann. 495 (1868); Walston v. Myers, 5 Jones (N. C.), 174 (1857). See Ashmore v. Penn. St. Towing, etc., Co., 28 N. J. L. 180 (1860); also Vanderslice v. The Superior, 28 Fed. Cas. No. 16,843 (1850).

[23] *United States.*—Steamer New Philadelphia, 1 Black, 62, 17 L. Ed. 84 (1861); The Quickstep, 9 Wall. 665, 19 L. Ed. 767 (1869); Steamer Webb, 14 Wall. 406, 20 L. Ed. 774 (1871); The Margaret, 94 U. S. 494, 24 L. Ed. 146 (1876); Transportation Line v. Hope, 95 U. S. 297, 24 L. Ed. 477 (1877); The Princeton, 3 Blatch. 54, Fed. Cas. 11,434 (1853); The Lyon, 1 Brown's Adm. 59, 15 Fed. Cas. 8,645 (1861); Steamboat Angelina Corning, 1 Ben. 109, Fed. Cas. 384 (1867); The Stranger, 1 Brown's Adm. (U. S.) 281, Fed. Cas. 13,525 (1871); The Oconto, 5 Biss. 460, Fed. Cas. 10,421 (1873); The Merrimac, 2 Sawyer, 586, Fed. Cas. 9,478 (1874).

Illinois.—Knapp v. McCaffrey, 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290.

Kentucky.—Varble v. Bigley, 14 Bush, 698, 29 Am. Rep. 435 (1879).

TOPIC B—CARRIERS OF PASSENGERS.

§ 185. Ferrymen.

Ferrymen, too, are met with in our earliest law reports, as may be seen in the following report of an interesting early case:[1] "I. de B. complains by his writ that G. de F. on a certain day and year at B. upon Humber had undertaken to carry his mare taken on his boat over Humber water safe and sound; whereas the said G. overloaded his boat with other horses, by reason of which overloading the mare perished, to his wrong and damage, etc. Richmond. Judgment of the writ; for he does not allege any tort in us; he only proves that he would have an action by a writ by way of covenant, not by way of trespass; wherefore, etc. Bankwell, J.: It seems that you committed a trespass when you overloaded the boat, whereby his mare perished, etc.; therefore answer. Richmond. Not guilty."

The ferryman, of course, remains in public calling to this day. Obviously a ferryman is a common carrier of goods if it is shown that he has taken the goods into his control; but he does not usually do so. He more commonly takes passengers only, and if the passengers have goods they commonly keep possession

Maryland.—Penn., etc., Steam Nav. Co. v. Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543 (1836).

Massachusetts.—Sproul v. Hemingway 14 Pick. 1 (1833).

New York.—Caton v. Rumney, 13 Wend. 387 (1835); Alexander v. Greene, 3 Hill, 9, 7 Ibd. 533 (1842); Wells v. Steam Nav. Co., 2 N. Y. 204 (1849); Wells v. Steam Navigation Company, 2 Com. 204, 4 Seld. 375 (1853); Merrich v. Brainard, 38 Barb. 574 (1860); Arctic Fire Ins. Co. v. Austin, 54 Barb. 559 (1869); Abbey v. St. Stephens, 22 How. Pr. 78 (1861); Emilinsen v. Penn. R. Co., 30 N. Y. App. Div. 203, 51 N. Y. Suppl. 606 (1898).

Pennsylvania.—Leonard v. Henrichson, 18 Penn. St. 40 (1851); Hayes v. Paul, 51 Penn. St. 134 (1865); Brown v. Clegg, 63 Penn. St. 51 (1869); Hayes v. Millar, 77 Penn. St. 238 (1874).

England.—The Julia, 14 Moore P. C. 210 (1860); Symonds v. Pain, 6 Hurl & N. 709 (1861); The Minnehaha, 1 Lush, 335 (1861).

[1] Y. B. 22 L. ib., Assis. pl. 41, B. & W. 192 (1348).

of their property. But whether he carries passeengers only or goods also, he is obviously a carrier by all tests.[2]

§ 186. Stage coaches.

The common method of carrying passengers before the invention of railways was by stage-coach; and there can, of course, be no doubt that the public coaches were common carriers of passengers. But though the principal business of a stage-coach was to carry passengers, coaches were frequently in the habit of carrying goods also; and when that was the case, the coach was also a common carrier of goods.[3] Thus in an early English case[4] Mr. Justice Jones "was of opinion that if a coachman commonly carry goods, and take money for so doing he will be in the same case with a common carrier and is a carrier for that purpose, whether the goods are a passenger's or a stranger's; the

[2] The following cases, among others, establish that the ferryman is a common carrier:

Alabama.—Babcock v. Herbett, 3 Ala. 392, 37 Am. Dec. 695 (1842); Frierson v. Frazier, 37 So. 825 (1904).

Arkansas.—Harvey v. Rose, 26 Ark. 3, 7 Am. Rep. 595 (1870).

California.—May v. Hanson, 5 Cal. 360, 63 Am. Dec. 135 (1855).

Georgia.—Self v. Dunn, 42 Ga. 528 (1871).

Illinois.—Claypool v. McAllister, 20 Ill. 504 (1858).

Iowa.—Whitmore v. Bowman, 4 Green, 148 (1853).

Kentucky.—Hall v. Renfo, 3 Met. 51 (1860).

Massachusetts.—Le Barron v. East B. Ferry Co., 11 Allen, 312, 87 Am. Dec. 717 (1865).

Mississippi.—Powell v. Mills, 37 Miss. 691 (1859).

Missouri.—Pomeroy v. Donaldson, 5 Mo. 36 (1837).

New York.—Wyckoff v. Greens County Co., 52 N. Y. 32, 11 Am. Rep. 650 (1873).

Ohio.—Wilson v. Hamilton, 4 Ohio St. 722 (1855).

Pennsylvania.—Smith v. Seward, 3 Pa. St. 342 (1846).

Tennessee.—Saunders v. Young, 1 Head (Tenn.), 219, 73 Am. Dec. 175 (1858).

Texas.—Albright v. Perrin, 14 Tex. 290 (1855).

[3] Beckman v. Shouse, 5 Rawle (Pa.), 179, 28 Am. Dec. 653 (1835).

[4] Lovett v. Hobbs, 2 Shower, 127 ((1680).

like of a waterman or Gravesend boat, which carries both men and goods."

So in the leading case of Dwight v. Brewster,[5] the defendants, who were the proprietors of a satge-coach, contended that they were not liable as common carriers, their business being the conveyance of passengers and their luggage; that the taking small packages was an affair of the drivers, who received the compensation, and who were answerable for negligence only, and that the proprietors were not responsible, though it appeared that less wages were paid to the drivers, in consequence of the opportunity they had of earning small sums of money in this way; whereas large packages were usually entered on the way-bill, and the proprietors received the compensation for the transportation. The court, however, held them liable as common carriers of goods. Chief Justice Parker said: "On the second count, which charges the defendants as common carriers, we think the facts proved are sufficient to constitute them such. Packages were usually taken in the stage-coach for transportation; large packages were entered in the book kept for the proprietors, and compensation taken for their use. That the principal business was to carry the mail and passengers is no reason why the proprietors should not be common carriers of merchandise, etc. A common carrier is one who undertakes, for hire or reward, to transport the goods of such as choose to employ him from place to place. This may be carried on at the same time with other business. The instruction of the judge in this particular, that the practice of taking parcels for hire, to be conveyed in the stage-coach, constituted the defendants common carriers, we think was right."[6]

[5] 1 Pick. (Mass.) 50, 11 Am. Dec. 133 (1822).

[6] *Delaware.*—McHenry v. Phil., W. & B. R. Co., 4 Harr. (Del.) 448 (1846).

Iowa.—Frinke v. Coe, 4 G. Greene, 555 (1854); Sales v. Western Stage Co., 4 Iowa, 547 (1857).

Massachusetts.—Dwight v. Brewster, 1 Pick. 501 (1822).

New Hampshire.—Bennett v. Dutton, 10 N. H. 481, B. & W. 105 (1839).

§ 187. Hackmen.

The necessity of regulating the business of hackmen upon the principles of public service law has been apparent for centuries. Unless there is positive law requiring that all be served for reasonable rates there will be in this business oppression and extortion. The necessity of such regulation is sufficient proof of its propriety. At times those that are hindered by the enforcement of these rules complain that they are unreasonable. In Atlantic City v. Fansler,[7] for instance, it was contended that the ordinance of the city that required every hackman to take anyone who applied at the established rates unless the sign "engaged" was displayed in good faith was unjustifiable.

But Mr. Justice Garretson said, upon certiorari to dispose of a conviction under this ordinance: "We are unable to see that any of the regulations imposed by this ordinance are unreasonable. There is nothing unreasonable in requiring the driver of an omnibus, permitted by the city's license to run his vehicle on the public street, to carry all persons applying to him for passage and legally tendering the fare, as common carriers are required to do; and a further regulation, such as is made in this ordinance, which provides for a convenient notification to intending passengers that the vehicle is already in actual use, which provision seems to be as well for the convenience of the driver, has nothing unreasonable in it."[8]

§ 188. Street railways.

A street railway company is obviously a common carrier of passengers. But, like a stage-coach, a street railway car may be

New York.—Hollister v. Nowlen, 19 Wend. 234 (1838); Cole v. Goodwin, 19 Wend. 251 (1838); Blanchard v. Isaacs, 3 Barb. 388 (1848).
Pennsylvania.—Beckman v. Shouse, 5 Rawle, 179 (1835).
South Carolina.—Peixotti v. McLaughlin, 1 Strob. 468 (1847).
Tennessee.—Walker v. Skipwith, Meigs, 502 (1822).
England.—Butler v. Basing, 2 Car. & P. 613 (1827).

7 (N. J.) 56 Atl. 119 (1903).
8 Bonce v. Dubuque, etc., Co., 53 Iowa, 278 (1880).

used for the transportation of goods as well as of passengers. This is now commonly true of the long inter-urban lines; but it may equally be true of the ordinary street railways, which are primarily intended merely for carrying passengers through the streets of a city. Thus in the case of Levi v. Lynn & Boston Railroad [9] it appeared to be the custom of the street railway to carry small parcels for hire on the front platform. The court held that this evidence was sufficient to warrant the jury in finding that the railway was a common carrier.

The cases which establish that the street railways are common carriers are again innumerable. And it is established beyond all question that they must serve all that apply with adequate facilities for reasonable compensation without discrimination. A few well-considered cases are subjoined.[10]

§ 189. Passenger elevators.

A passenger elevator is plainly not a common carrier, as it does not purport to carry all who apply for transportation at a reasonable rate. But in maintaining and operating an elevator for passengers, the owner is, according to the majority of the cases, under a duty to exercise the same measure of care as is re-

[9] 11 Allen (Mass.), 300, 87 Am. Dec. 713, B. & W. 11 (1865).

[10] *United States.*—Van der Venter v. Chicago City R. Co., 26 Fed. 32 (1885); Milwaukee Electric Ry. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898).

Alabama.—Mobile St. Ry. v. Walters, 135 Ala. 227, 33 So. 42 (1902).

California.—Barrett v. Market St. Ry., 81 Cal. 296, 22 Pac. 859 (1889).

Indiana.—Citizens' Ry. Co. v. Twiname, 111 Ind. 587 (1887).

Illinois.—Dean v. Chicago General R. Co., 64 Ill. App. 165 (1896).

Massachusetts.—Levi v. Lynn & Boston R. R. Co., 11 Allen, 300, B. & W. 11 (1865).

Nebraska.—Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 20 L. R. A. 316, 55 N. W. 270, 38 Am. St. Rep. 753 (1893); Pray v. Omaha St. R. Co., 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717 (1895); East Omaha St. R. Co. v. Godola, 50 Neb. 906, 70 N. W. 491 (1897); Lincoln F. Co. v. Heller, 100 N. W. 197 (1904).

New York.—Barker v. Central Pk. N. & E. Ry., 151 N. Y. 237, 45 N. E. 550, 56 Am. St. Rep. 626, 35 L. R. A. 489 (1896).

quired of a public carrier of passengers, the highest degree of care which human foresight can suggest.[11] But certain cases [12] refuse to go to this extent, holding that as the owner of the elevator is not engaged in a public calling, there is no occasion for imposing the extraordinary liability. Few courts, indeed, regard the owner of the elevator as a common carrier for all purposes in the sense that he is engaged in a public calling and obliged to serve all without discrimination. In the matter of exercising care his position is analogous to that of the common carrier of passengers, but beyond this the analogy ceases. The extraordinary liability of the carrier of passengers does not arise out of the nature of the calling, but rather out of the high regard for human life. Due care is care commensurate with the circumstances. One of the determining circumstances is that human life and safety are involved, and when such is the case, more diligence and circumspection is exacted than in other situations.

§ 190. Pleasure railways.

There are certain enterprises whereby people are moved about, like "merry-go-rounds," "scenic railways," "shooting-the-chutes," "ferris wheels," and the like, which are obviously not common carriers, however willing their proprietors may be

[11] Marker v. Mitchell, 54 Fed. 637 (1893), affirmed in 62 Fed. 139, 10 C. C. A. 306, 22 U. S. App. 325 (1894); Treadwell v. Taylor, 80 Calif. 574, 5 L. R. A. 498, 13 Am. St. Rep. 175 (1889); Goodsell v. Taylor, 41 Minn. 207, 4 L. R. A. 673, 16 Am. St. Rep. 700 (1889); Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35 (1898); Edwards v. Burke, 78 Pac. (Wash.) 610 (1904); Kentucky Hotel Co. v. Camp, 97 Ky. 424, 30 S. W. 1010 (1895); Southern, etc., Assn. v. Lawson, 97 Tenn. 367, 37 S. W. 86, 56 Am. St. Rep. 804 (1896); Wise v. Ackerman, 76 Md. 375 (1896); Lee v. Knapp, 55 Mo. App. 391 (1893), (reasonable or ordinary care).

[12] The following cases point out that the passenger elevators are really not common carriers. Sevier v. Bradley, 179 Mass. 329, 60 N. E. 395 (1901); Griffin v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901); Edwards v. Manufacturers' Building Co. (R. I.), 61 Atl. 646 (1905).

to take all that will pay. This point is well discussed in a New York case[13] involving the propriety of granting eminent domain for the Niagara Gorge trolley line, where Mr. Justice Andrews said, in part: "Whatever rule, founded on the adjudged cases, may be formulated on this subject, it cannot, we think, be framed so as to include the present case. The fact that the road of the petitioner may enable the portion of the public who visit Niagara Falls more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one so as to justify condemnation proceedings. The case does not, we think, differ in principle from an attempt on the part of a private corporation, under color of an Act of the Legislature, to condemn lands for an inclined railway, or for a circular railway, or for an observatory, to promote the enjoyment or convenience of those who may visit the Falls."

[13] Matter of the Niagara Falls & W. Railway, 108 N. Y. 375, 15 N. E. 429.

PART II.

Primary Duties of Common Carriers.

CHAPTER VII.

CONDITIONS PRECEDENT TO SERVICE.

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225. Requirement of stations by the courts; conservative view.
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§ 201. Public duty the basis of the restriction to reasonable charges.

The fundamental duty in public employment is to serve all who apply; and this duty has important consequences. Therein public employment differs altogether from private business; and while it is true that a man in ordinary business must be permitted to manage his own affairs in his own way, the argument is not applicable to public callings. The State may, for instance, dictate the price at which a common carrier must serve, because the law requires the carrier to serve the public properly. It would be idle to lay upon the common carrier the duty to serve all who apply and at the same time permit that carrier to charge any extortionate rate that it might be his fancy to fix. To establish the right to regulate rates, and the other rights of the public to regulate the business of common carrier it is necessary to show only the duty of the carrier to serve all who apply.

Where it is said that it is the duty of a public service company to serve all, that is the statement of a principle, not of a rule of law. The fact is that there are many conditions precedent to the obligation of a particular public service company to serve a particular applicant. Those who wish service must put themselves in a proper position to demand service; until this condition precedent is performed there is no obligation to serve. Moreover, in connection with such proper application there must be tender of adequate compensation; for clearly a public service company is not obliged to serve otherwise. In these two classes

of cases at all events there are conditions precedent to be performed by the particular applicant before a legal duty is owed to him, even though he wishes a service in respect to which there has been public profession of a public employment.

TOPIC A—DUTY OWED TO CERTAIN CLASSES OF PERSONS.

§ 202. Service owed to certain classes.

In most public callings service is due to special classes only, and not to the public in general. This is the consequence of the principles developed in the preceding chapter concerning the essential nature of public employment and the necessary scope of public profession. By these fundamental rules an employment is held public in its nature only in so far as it is affected with a public interest, and only to the extent that it has been undertaken; both that public interest and that public profession must co-exist in order that there may be public duty in the premises. That being so, it is natural to find that in most public callings either the public necessity is confined to a certain class or the undertaking assumed has been solely toward a special class. It is to that extent and to them that the public duty is therefore conferred. The discussion below of many well-known examples of limitation of this sort will make this matter plainer.

From ancient times it has been recognized that in certain public employments the public duty was owed only to bona fide travellers. It was only as to dealings with travellers that these callings were affected with a public interest. Those who offer necessary services, protection or transportation, to wayfarers and travellers always have the upper hand; their monopoly is temporary, but it is effectual, while these very same persons, in offering their services to the local population under other circumstances, have no monopoly at all. There is every reason, therefore, why innkeepers should be bound to entertain weary wayfarers, and why carriers of passengers must take up travellers bound their way; but there is no special reason in the nature of

the case why they should not be free to deal with other persons as they please.

As a general principle, therefore, carriers of passengers are bound to carry only travellers. No similar restriction limits the duty of carriers of goods; but their undertaking is subject to conditions of another sort, as will be seen later.

§ 203. Person desiring shelter merely.

A person who desires shelter merely is not one whom the carrier of passengers is bound to serve; and it may, therefore, decline to receive such a person on its premises. So, a ferry company, plying during the night between the opposite shores of a river, might, no doubt, decline to admit to its boat a person who desired only to stay on the boat during the night for the purpose of securing a lodging. Similarly, a railroad company is not bound to keep open its station after the last train has left in order to shelter an intending passenger who, having missed his train, is now waiting for a street car.[1] As Mr. Justice Devens said: "This room was not a place where every one might resort and use it for his own business, and he could not expect that it, or the way out of it, would be kept lighted until the arrival of the horse car for which, as he stated, he waited."

§ 204. Person desiring to transact business.

A person who desires to ride in a vehicle of the carrier merely in order to transact business in it has no right to be received. Doubtless if a person desires transportation to a certain destination he is entitled to demand it of a public carrier to that place, even if incidentally he means to transact business en route; but in order to demand carriage he must be desirous of reaching his destination. Therefore one has no right to demand carriage for the purpose of selling papers, or making contracts for trans-

[1] Heinlein v. Boston & P. R. R., 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676 (1888).

porting baggage, or taking care of express packages. As Mr. Justice Hunt said, in the case of The D. R. Martin:[2] "The suitable carriage of persons or property is the only duty of the common carrier. A steamboat company or a railroad company is not bound to furnish travelling conveniences for those who wish to engage, on their vehicles, in the business of selling books, papers, or articles of food, or in the business of receiving and distributing parcels or baggage, nor to permit the transaction of this business in their vehicles, when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their vehicles for such purposes."[3]

§ 205. **Sleeping and parlor cars subject to similar rule.**

The public profession and obligation of a sleeping-car, parlor-car, or dining-car company is subject to a similar limitation. Its services are tendered, not to all persons who may desire shelter or food, but only to passengers on the train to which they are attached, and indeed only to such passengers as the carrier permits to ride in the cars of the company. So in Lawrence v. Pullman Palace Car Company[4] Mr. Justice Devens said: "The defendant company could not certainly furnish a berth in its cars until the person requesting it had become entitled to transportation by the railroad company as a passenger, and he must also be entitled to the transportation for such routes, distances, or under such circumstances, as the railroad company should determine to be those under which the defendant company would be authorized to furnish him with its accommodations. The defendant company could only contract with a passenger when he was of such a class that the railroad company permitted the contract to be made."

[2] 11 Blatch. 233, Fed. Cas. No. 1030, B. & W. 114 (1873).

[3] Barry v. Oyster Bay, etc., Steamboat Co., 67 N. Y. 301, 23 Am. Rep. 115 (1876); Jenks v. Coleman, 2 Sumn. (U. S.) 221, 13 Fed. Cas. 7,258, B. & W. 100 (1835).

[4] 144 Mass. 1, 10 N. E. 723, 59 Am. Rep. 58, B. & W. 139 (1887).

§ 206. Person demanding incidental services.

While the duty of the carrier to receive passengers for carriage extends only to travellers, he owes an incidental duty to certain other persons whose purpose in coming to the carrier is connected with transportation of passengers or goods, though they are not themselves travellers. Thus a carrier must, it would seem, admit a person who comes to make an inquiry about trains, or to ask for a timetable.[5] So he must admit to his premises a person coming to a train to mail a letter.[6] And so one is entitled to admission to the premises of a carrier who comes to look for freight which is expected to arrive,[7] or to help unload freight which has arrived.[8]

§ 207. Person assisting or meeting passengers.

In the same way the carrier of passengers is under a duty to receive persons who come to help passengers in some way. Thus a hackman who comes to a station to bring a passenger is entitled to the carrier's services.[9]

A common case of this sort is that of a person who comes to the carrier's premises in order to assist a passenger on board or to bid him goodbye. Such a person, though not a passenger, is entitled to demand of a carrier that he be admitted to the station; and he may even, in order to assist a passenger, demand admittance to a train, at least until the carrier furnishes proper assistance.[10]

[5] Bradford v. Boston & M. R. R., 160 Mass. 392, 35 N. E. 1131, B. & W. 124 (1894).

[6] Hale v. Grand Trunk R. R., 60 Vt. 605, 15 Atl. 300 1 L. R. A. 187 (1888).

[7] Toledo, W. & W. Ry. v. Grush, 67 Ill. 262, 16 Am. Rep. 618 (1873).

[8] Holmes v. North Eastern Ry., L. R. 4 Ex. 254 (1869).

[9] Tobin v. Portland, S. & P. R. R., 59 Me. 183, 8 Am. Rep. 415 (1871).

[10] *Indiana.*—Louisville, etc., R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443 (1889).

Iowa.—Galloway v. Chicago, etc., R. Co., 87 Iowa, 458, 54 N. W. 447 (1893).

In Johnson v. Southern Railway,[11] Mr. Chief Justice McIver said: "A female holding a ticket entitling her to transportation as a passenger on a railroad train, if feeble, or incumbered with heavy baggage or other impediments, is entitled to have assistance in boarding the train; and, if the same is not afforded by the railroad officials or servants, her husband or other escort may render her the necessary assistance, and for this purpose is entitled to enter the train, and is entitled to a reasonable time to leave the train before it is put in motion."

Similarly the carrier is bound to admit to his premises one who comes to meet an arriving passenger.[12] Thus, where a man who had come to a railway station to meet his wife was injured by a defect in the premises, he was held entitled to compensation. The railway, the court said, was bound to keep its premises in safe condition for its customers, and the injured person was a customer.[13]

Mr. Chief Justice Graves said: "It is admitted in argument that had his presence at the station been in the character of a hackman engaged in running for passengers his stepping aside would not have been wrongful, and the duty of the company would have extended to him. We think it would be straining common sense to make such a distinction as is implied here. He

Massachusetts.—Lucas v. Taunton & N. B. R. R., 6 Gray, 64 (1856, semble).

Missouri.—Doss v. Mo., etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371 (1875).

New York.—Rot' v. Forty-second St., etc., Ferry R. Co., 56 N. Y. Super. Ct. 151, 1 N. Y. Supp. 518 (1888).

South Carolina.—Johnson v. So. R. Co., 53 S. C. 203, 31 S. E. 212, 69 Am. St. Rep. 849 (1898).

Texas.—Gulf, etc., Ry. Co. v. Williams, 21 Tex. Civ. App. 469, 51 S. W. 653 (1899); Hamilton v. Texas R., 64 Tex. 251, 53 Am. Rep. 756 (1855).

Wisconsin.—Dowd v. Chicago, M. & S. R., 84 Wis. 105, 54 N. W. 24, 20 L. R. A. 527 and note (1893, semble).

[11] *Supra.*

[12] McKone v. Michigan C. R. R., 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596 (1883); Missouri, K. & T. Ry. v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 905 (1894).

[13] McKone v. Michigan C. R. R., *supra.*

was a customer within the essence of the rule just mentioned. The company was bringing his wife to him, and he went to receive and protect her. Had his errand been to receive a bale of goods or a horse, no one would doubt that he had all the rights of a customer, and it seems little less than preposterous to contend that the right was not simply different or inferior, but absolutely wanting, because it was his wife that he went for."

§ 208. Right involved is that of the passenger.

The right of the customer who is not a passenger or an intending passenger, to be received by the carrier in order to accompany or to meet a passenger, is a right primarily due to the passenger only; and it is only so far as the interest of the passenger requires it that the service can be demanded of the carrier. Thus, when a person came to a station out of curiosity, in order to see the President of the United States, who was a passenger on a passing train, the carrier owed him no duty.[14]

Mr. Justice Sharswood said: "Had it been the hour for the arrival or departure of a train and he had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of the defendants as much as if he was actually a passenger. . . . The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity, or to give vent to his patriotic feelings. The defendant had nothing to do with that."

A similar case was one where one boarded a train to speak with an acquaintance and was injured under circumstances which would have shown liability if the plaintiff had been a passenger. But it was held that the defendant company owed such a person no duty of that sort since he was not upon the train in connection with any duty which the carrier owed the passenger.[15]

[14] Gillis v. Pennsylvania R. R., 59 Pa. 129, 98 Am. Dec. 317 (1869).
[15] Bullock v. Houston & T. C. Ry. (Tex. Civ. App.), 55 S. W. 184 (1900).

§ 209. Extent of carrier's duty to such persons.

That such persons are not passengers is clear, but they are, in the language of the cases, "customers," and are entitled to safe and properly lighted premises.[16]

But they are not entitled to the active protection which is due to passengers. Thus, while waiting in a station for a train, in order to meet a passenger, such a person is not entitled to protection against the assault of a stranger.[17]

But where the person actually gets on board the train, assisting a passenger, and the train starts without giving him time to alight safely, the question whether the carrier has been guilty of a breach of duty is a difficult one. One or two cases are clear enough.

If the conductor had no notice that the assistant was on the train, and the train stopped the usual and reasonable time, the

[16] *United States.*—Ill. Cent. R. Co. v. Griffin, 80 Fed. 278, 53 U. S. App. 22, 25 C. C. A. 413 (1897).

Georgia.—Georgia Ry., etc., Co. v. Richmond, 98 Ga. 495, 25 S. E. 565 (1896).

Illinois.—Toledo, W. & W. Ry. v. Grush, 67 Ill. 262, 16 Am. Rep. 618 (1873).

Maine.—Tobin v. Portland, S. & P. R. R., 59 Me. 183, 8 Am. Rep. 415 (1871).

Massachusetts.—Bradford v. Boston & M. R. R., 160 Mass. 392, 35 N. E. 1131 (1894).

Michigan.—McKone v. Michigan C. R. R., 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596 (1883).

Nebraska.—Union Pac. R. Co. v. Evans, 52 Nebr. 50, 71 N. W. 1062 (1897).

New York.—Hank v. N. Y., etc., R. Co., 34 N. Y. App. Div. 434, 54 N. Y. Supp. 248 (1898).

Texas.—Hamilton v. Texas & P. Ry., 64 Tex. 251, 53 Am. Rep. 756 (1855); Missouri, K. & T. Ry. v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 905 (1894).

Vermont.—Hale v. Grand Trunk R. R., 60 Vt. 605, 15 Atl. 300, B. & W. 124 (1888).

England.—Holmes v. North Eastern Ry., L. R. 4 Ex. 254 (1869).

[17] Houston & T. C. Ry. v. Phillis, 96 Tex. 18, 69 S. W. 994, 97 Am. St. Rep. 868 (1902).

carrier has performed its duty.[18] But if the conductor had notice that the assistant was on the train, the carrier must give him a reasonable time to alight.[19] Even if the conductor does not know of the presence of the assistant, there is good authority for holding the carrier if the train starts without giving him a reasonable time to alight after notice that the train was about to start.[20]

In Doss v. Missouri, Kansas & Texas Railroad[21] Mr. Justice Napton said: "The plaintiff was entitled to have sufficient time to escort the lady under his charge to her seat, and then leave the cars. If the time was not enough or if the defendant's agents failed to give notice of the starting of the train, by the usual signals, of an oral cry of 'all aboard' from the conductor, and the ringing of the bell by the engineer, it was not such ordinary care as the defendant was bound to exercise, both toward passengers and persons in the situation of plaintiff." But in a Massachusetts case it was said that the carrier was not bound to give such a person special notice of the time of the departure of the train.[22]

[18] Coleman v. Georgia R. R., 84 Ga. 1, 10 S. E. 498 (1889); Hill v. Louisville & N. R. R. (Ga.), 52 S. W. 651 (1905); Missouri, K. & T. Ry. v. Miller, 8 Tex. Civ. 241, 27 S. W. 905 (1894); Griswold v. Chicago & N. W. Ry., 64 Wis. 652 (1885). In Missouri, K. & T. Ry. v. Miller, the court said: "It was the duty of the appellee to take notice of the usual length of time given for this purpose, and if it was not sufficient, and it was necessary for him to go into the train, in order to place upon the company the duty of holding the train specially for him to disembark, he must have given notice of his intention."

[19] Louisville & N. R. R. v. Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443 (1889); Doss v. Missouri, K & T. R. R., 59 Mo. 27, 21 Am. Rep. 371 (1875); Johnson v. Southern Ry., 53 S. C. 203, 31 S. E. 212, 69 Am. St. Rep. 849 (1898).

[20] Doss v. Missouri, K. & T. R. R., 59 Mo. 27, 21 Am. Rep. 371 (1875); Johnson v. Southern Ry., 53 S. C. 203, 31 S. E. 212, 69 Am. St. Rep. 849 (1898).

[21] *Supra.*

[22] Lucas v. New Bedford & T. R. R., 6 Gray (Mass.), 64 (1856).

TOPIC B—TENDER OF COMPENSATION REQUIRED.

§ 210. **Payment of fare as condition of receiving.**

The carrier may make it a condition of accepting a passenger or goods for carriage that fare or freight be paid in advance;[1] or that a ticket shall be purchased [2] and presented at the gate before entering the train.[3]

§ 211. **What is sufficient tender of fare or freight.**

The payment in advance of fare or freight to a carrier is not the payment of a debt, but the satisfaction of a reasonable condition imposed by regulation of the carrier. A debtor must seek his creditor and make legal tender of the exact amount due. But the passenger paying his fare may tender a greater amount and demand change, provided it is a reasonable demand. This question was discussed at length in the case of Barrett v. Market Street Cable Railway.[4] This was an action for damages for

[1] Tarbell v. Central Pac. R. R., 34 Cal. 616 (1868); Nye v. Marysville & Y. C. S. R. R., 97 Cal. 461, 32 Pac. 530 (1893). This is a provision of the California Civil Code (§ 2187), which, however, merely re-enacts the common law. Prepayment of freight, Galena, etc., R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574 (1857); Ill. Cent. R. Co. v. Frankenburg, 54 Ill. 88, 5 Am. Rep. 92 (1870); Wilder v. St. Johnsbury, etc., R. Co., 66 Vt. 636, 30 At. 41 (1894).

[2] *Illinois.*—Ill. Cent. R. Co. v. Loutham, 80 Ill. App. 579 (1898); Chicago, etc., R. Co. v. Boger, 1 Ill. App. 472 (1877).

Indiana.—Pittsburgh, etc., R. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68 (1877).

Michigan.—Van Dusan v. Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354 (1893).

Nebraska.—Burlington & M. R. R. R. v. Rose, 11 Neb. 177, 8 N. W. 433 (1881).

New York.—Corwin v. Long Island R. Co., 2 N. Y. City Ct. 106 (1885).

Ohio.—Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457 (1860).

Texas.—International, etc., R. Co. v. Goldstein, 2 Tex. App. Civ. Cas. 274 (1884).

Vermont.—Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 337 (1858).

[3] Dickerman v. St. Paul U. D. Co., 44 Minn. 433, 46 N. W. 907 (1890).

[4] 81 Cal. 296, 22 Pac. 859, 15 Am. St. Rep. 61, 6 L. R. A. 336, B. & W. 297 (1889).

forcible ejection. The plaintiff tendered to the conductor of the defendant a five-dollar gold piece for a five-cent fare. The conductor refused it and thereupon ejected the plaintiff from the car.

Mr. Justice Paterson said: "The question on the merits to which counsel have mainly directed their arguments is, whether the passenger was bound to tender the exact fare. It is argued for the appellant that the rule in relation to the performance of contracts applies, and that the exact sum must be tendered. But we do not think so. The fare can be demanded in advance as well as at a subsequent time. And so far as this question is concerned, we see no difference in principle where the fare is demanded in advance and where it is demanded subsequently. If it be demanded in advance, there is no contract. The carrier simply refuses to make a contract. Consequently the rule in relation to the performance of contracts, whatever it be, has no necessary application. The obligation of the carrier in such case would be that which the law imposes on every common carrier, viz., that he must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry. This duty, like every other which the law imposes, must have a reasonable performance. And we do not think it would in all cases be reasonable for the carrier to demand the exact fare as a condition of carriage."

§ 212. What denomination of money may be tendered.

What denomination of money it will be reasonable to require a conductor to change has been considered in several cases. In the case just cited, as has been seen, it was held reasonable to tender a five-dollar coin. On the other hand, a tender of a five-dollar bill in a street car has been held unreasonable, at least where a regulation of the company required the conductors to

furnish change for two-dollar bills, and no custom to change larger bills was shown.[5]

In the case of Barker v. Central Park, North and East River Railroad,[6] Mr. Justice Bartlett said: "In the case at bar the reasonableness of the rule established by the defendant is obvious. In a large city like New York the round trip of a car of any street line means a very considerable number of fares paid in, and the necessity for the conductor to carry and pay out a large amount of small change. When the defendant enacted the rule requiring its conductors to furnish change to a passenger to the amount of two dollars it did all that could reasonably be expected of it in consulting the convenience of the general public, and it would be unreasonable and burdensome to extend the amount to five dollars. It would require conductors to carry a large amount of bills and small change on their persons, and greatly impede the rapid collection of fares."

The weight of authority may be said to favor the view herein expressed; but there is no doubt that a tender of a greater proportionate amount is unreasonable. Thus, a tender of a twenty-dollar bill to pay a fare of one dollar and twenty-five cents is obviously unreasonable.[7] In so holding Mr. Chief Justice Robinson said: "The general practice is for the passengers to pay at the office and get tickets. The officer attending there might reasonably object to an offer of a twenty-dollar gold piece in order that one dollar and twenty-five cents might be taken out of it. If any or all of the passengers might put him to the trouble of giving back so much change as that, it would be impossible that the business could be transacted with the expedition which is necessary, or with proper caution, for there would be people probably who would soon take their chance of putting off coun-

[5] Barker v. Central Park N. & E. R. R. R., 151 N. Y. 237, 45 N. E. 550, 56 Am. St. Rep. 626, 35 L. R. A. 489 (1896); Muldowney v. Pittsburgh & B. Tr. Co., 8 Pa. Super. Ct. 335, 43 W. N. C. 52 (1898).

[6] *Supra.*

[7] Fulton v. Grand Trunk Ry., 17 Up. Can. Q. B. 428 (1859).

terfeit coin or bills, if they found that the officer was obliged to receive them under circumstances which did not admit of his taking time to scrutinize them; and a person rushing into a car without a ticket has no reason to expect that he will find the conductor prepared to change a twenty-dollar gold piece, for he relies upon receiving tickets from the parties, or if money is to be paid to him instead, that it will be paid with reasonable regard to what is convenient under the circumstances."

§ 213. Tender of money refused as counterfeit.

If the tender of a proper amount is made, the conductor refuses it at his peril. Thus, if he rejects a bill or coin as counterfeit, or a coin as too much worn, and the money is found to be in fact good, the carrier is responsible; and if the passenger was ejected on the ground that he refused to pay his fare, the carrier is liable for the wrongful ejection.[8]

But a refusal to carry one who presents a mutilated note is justifiable, although it could be redeemed, for the applicant cannot cast upon the carrier the redemption of it.[9]

§ 214. Tender of fare usually waived by the carrier.

But though the carrier is entitled to insist upon the payment of fare or freight before accepting passengers or goods for carriage, he may, of course, waive the requirement, and he does so when (as usually happens) he accepts a passenger or goods for carriage without making such a demand. When this happens, he is a common carrier of the passenger or goods though the fare or freight has not been paid.[10]

[8] Mobile St. Ry. v. Watters, 135 Ala. 227, 33 So. 42 (1902); Atlanta C. T. Ry. v. Keeny, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824 and note (1896); Breen v. St. Louis Tr. Co., 102 Mo. App. 479, 77 S. W. 78 (1903); Jersey City & B. R. R. v. Morgan, 52 N. J. Law, 60, 18 Atl. 904 (1890); Vassau v. Madison E. Ry., 106 Wis. 301, 82 N. W. 152 (1900).

[9] North H. C. R. R. v. Anderson, 61 N. J. L. 248, 39 Atl. 905 (1898).

[10] *United States.*—Mellquist v. The Wasco, 53 Fed. 546 (1892).

Illinois.—Ohio & M. R. R. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336 (1851);

TOPIC C—GOODS MUST BE TENDERED IN A PROPER MANNER.

§ 215. Goods must be tendered to the carrier at proper time.

Carriers of goods are only obliged to accept goods which are actually presented to them for carriage at a reasonable time and place. Thus, in Frazier v. Kansas City, St. Joe & Council Bluffs Railway,[1] where a complaint was made against a railroad for not forwarding freight offered, it was proved that the cattle in question had not arrived at the station when the train was being loaded, but that the shipper had sent ahead and requested that the train be held until he could get his cattle to the station and load them; it was decided that the railroad was not liable. Mr. Justice Day said: "A delay of a few minutes at one station might occasion a corresponding delay of every train on the line of road, and even result in accidents destructive of property and life. No person desiring to become a passenger upon a train could rightfully demand a delay of one minute to enable him to reach the train and get on board. Upon what principle, then, can these plaintiffs demand damages because the defendant's train did not wait until they could drive their hogs into defendant's yard, load four cars, count them, have way-bill made out, shipping contract signed, and the hogs placed in the train?"

Woods v. Devin, 13 Ill. 746, B. & W. 130 (1852); Frink v. Shroyer, 18 Ill. 416 (1857); Cleveland, C., C. & S. L. R. R. v. Scott, 111 Ill. App. 234 (1903).

Indiana.—Evansville & T. H. R. R. v. Keith, 8 Ind. App. 57, 35 N. E. 296 (1893).

Iowa.—Russ v. Steamboat War Eagle, 14 Ia. 363 (1862).

Mississippi.—Hurt v. Southern R. R., 40 Miss. 391 (1866).

North Carolina.—Porter v. Raleigh & G. R. Co., 132 N. C. 71, 43 S. E. 547 (1903).

Texas.—Houston & T. C. R. R. v. Washington (Tex. Civ. App.), 30 S. W. 719 (1895).

[1] 48 Iowa, 571 (1878).

§ 216. Passengers must enter vehicle at the proper time.

A passenger must present himself for carriage and enter the train at the proper time, neither too early nor too late. He cannot force himself on the railroad as a passenger by entering the car prematurely. Thus, he does not become a passenger by entering the car before it has been placed in a position in which passengers are to be received,[2] or by entering the car, even if it is at the proper position at the station, if it is not yet ready for passengers.[3] Similarly, a person who reaches a train after it begins to move has no right to be received, and if he attempts to board he is not a passenger.[4]

§ 217. Goods must be tendered properly packed.

The carrier may refuse to receive goods for carriage unless they are properly packed; and indeed he must so refuse or take the risk from the improper packing.[5] The same thing is true where freight is improperly loaded on a car by the shipper; the carrier must decline to accept it, properly prepare it himself for carriage, or be responsible for its safety.[6] But the requirements of the carrier as to packing must be reasonable; he cannot reject a package on this ground if it is in fact rea-

[2] Farley v. Cincinnati H. & D. R. R., 108 Fed. 14, 47 C. C. A. 156 (1901); Curry v. Georgia M. & G. R. R., 92 Ga. 293, 18 S. E. 422 (1893).

[3] Brown v. Scarboro, 97 Ala. 316, 12 So. 289 (1893); Hodges v. New H. S. Co., 107 N. C. 576, 12 S. E. 597 (1890); Tillett v. Lynchburg & D. R. R., 115 N. C. 662, 20 S. E. 480 (1894).

[4] Illinois C. R. R. v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 61 Am. St. Rep. 68*n*, 39 L. R. A. 148 (1897); Merrill v. Eastern R. R., 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705 (1885); Georgia Pac. Ry. v. Robinson, 68 Miss. 643, 10 So. 60 (1891).

[5] The David & Caroline, 5 Blatch. 266, Fed. Cas. No. 3,593 (1865); Union Express Co. v. Graham, 26 Ohio St. 595 (1875).

[6] Elgin, J. & E. Ry. v. Bates Mach. Co., 98 Ill. App. 311 (1901). See Miltimore v. Chicago & N. W. R. R., 37 Wis. 190 (1875). Compare Michigan Congress Water Co. v. Chicago & G. T. Ry., 2 Int. Com. Rep. 428 (1888).

sonably safe for shipment.[7] In general the loading and unloading of goods are under the carrier's control and he is responsible for any injury incident thereto. But if the shipper assumes the responsibility of loading and unloading the carrier is thereby relieved from liability for loss in that connection.[8] But if the improper loading was apparent to the carrier's servant from ordinary observation the carrier will be liable.[9]

§ 218. Special freight may require special tender.

Although in general, freight of all kinds may be forwarded from the regular freight stations, still there are special kinds of freight that require special handling. A lucid exposition of this exception may be found in Harp v. Choctaw, Oklahoma & Gulf Railroad.[1] A railway company having a newly constructed line through a locality underlaid with coal at first allowed owners of mines to load coal from wagons upon cars shunted upon the station side track; later they withdrew this privilege and required coal miners to have spur tracks put in to their own premises. The railroad was held justified.

In the Circuit Court of Appeals the following reasons were given by Thayer, Circuit Judge: "A common carrier is entitled, in the first instance, by the common law, to establish reasonable rules and regulations governing the manner and

7 Bluthenthal v. Southern Ry., 84 Fed. 920 (1898); Rhode Island E. & B. Co. v. Lake Shore & M. S. Ry., 6 I. C. C. Rep. 176 (1894).

8 McCarthy v. Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29 (1893); Penn. Co. v. Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215 (1897); Loveland v. Burke, 120 Mass. 139, 21 Am. Rep. 507 (1876); Jackson Architectural Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432 (1899); Ross v. Troy, etc., R. Co., 49 Vt. 364, 24 Am. Rep. 144 (1877); Miltimore v. Chicago, etc., Ry. Co., 37 Wis. 190 (1875).

9 McCarthy v. Louisville, etc., Ry. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29 (1893).

1 125 Fed. 445, 61 C. C. A. 405 (1903). See, to the same effect, Illinois R. R. v. People, 19 Ill. App. 141 (1886). Compare U. S. ex rel. Coffman v. Norfolk & W. R. R., 109 Fed. 831 (1901).

form in which it will receive such articles as it professes to carry, and providing how they shall be packed for shipment so that they may be handled and transported conveniently, safely, and expeditiously. This power to make reasonable regulations with respect to the manner in which it will receive commodities for transportation implies the existence of a power on the part of a common carrier to change or modify such regulations from time to time upon reasonable notice to the public, as otherwise it might be compelled to pursue a particular practice of receiving goods which it had once adopted, and was at the time attended with no inconvenience, after that practice had become exceedingly inconvenient and burdensome both to itself and the public. It is manifest, we think (indeed, so manifest that we might almost take judicial notice of the fact), that no railroad constructed through extensive coal fields and engaged in transporting coal to market could for any considerable period follow the practice of setting out cars on its station side tracks, some distance from the place where coal is mined, and permitting coal to be hauled thence by wagons and loaded into the cars by the slow process of shoveling. The useless consumption of time, and the additional expense incident to the handling of the commodity in question, in large quantities, in that primitive manner, would occasion great public loss and inconvenience, to say nothing of the loss sustained by the carrier, and the serious manner in which that method of handling coal would interfere with the movement of its trains and the transaction of its other business."

It may well be doubted whether this case is rightly decided upon general principles. It is true that a railway may make a lower rate to those shippers of coal who furnish their own facilities for loading coal in so economical a manner as by a tipple. But it would seem that the railroads must receive for transportation at reasonable rates also coal or any other commodity usually carried in bulk from wagons; this

was said squarely in one case before the interstate commerce commission.[2] There the complainant, who was a druggist, offered coal for transportation from a wagon; the defendant railway refused to handle it because it was tendered in this way by such a person. But the commission inclined to hold the refusal unjustifiable, if based upon such reasons alone, saying: "That the complainant is a druggist, instead of a so-called legitimate operator, does not in the least abridge his right to enter the field of competition with those who possibly followed some other calling before they were coal operators. That he unloaded cars from wagons is not of itself a bar to his right to ship, else would a great bulk of our commerce suffer eclipse, since much of it is hauled in that way."[3]

§ 219. Shipments in bulk should be received under proper conditions.

Every shipper having access to the railroad (by spur track or otherwise) should have the right to demand that the carrier receive his bulky goods at the track, and not require them to be tendered at the station. This right should exist in the case of all goods so bulky or otherwise of such a nature that a course of business has become established for them to be received in bulk beside the track. Such goods would include coal, grain, oil, and other things carried in bulk; heavy machinery and bulky manufactures of stone and metal, the carting of which by means of drays to a station would greatly and unnecessarily increase the cost of transportation. There is little direct authority on the point; the few decisions at common law involving a similar point turning on the right of a

2 Thompson v. Pennsylvania Ry., 10 I. C. C. Rep. 640 (1905).

3 Compare Riddle, Dean & Co. v. Pittsburg & L. E. R. R., 1 Int. Com. Rep. 688, 1 I. C. C. Rep. 374 (1888). Accord. Glade Coal Co. v. Baltimore & O. R. R., 10 I. C. C. Rep. 226 (1904).

consignee to receive beside the track, not of a consignor to deliver.[4]

The sound doctrine seems to be clearly expressed in the following extract from the opinion of Mr. Justice Baxter in Coe v. Louisville & Nashville Railroad,[5] and though the point under discussion is the delivery of freight, the reasoning applies equally to its reception: "This rule is just and convenient, and necessary to an expeditious and economical delivery of freights. It has regard to their proper classification, and to the circumstances of the particular case. Under it articles susceptible of easy transfer may be delivered at a general delivery depot provided for the purpose. But live stock, coal, ore, grain in bulk, marble, etc., do not belong to this class. For these some other and more appropriate mode of delivery must be provided. Hence it is that persons engaged in receiving and forwarding live stock, manufacturers consuming large quantities of heavy material, dealers in coal, and grain merchants, receiving, storing, and forwarding grain in bulk, who are dependent on railroad transportation, usually select locations for the prosecution of their business contiguous to railroads, where they can have the benefit of side connections over which their freight can be delivered in bulk at their private depots; and may a railroad company, after encouraging investments in mills, furnaces, and other productive manufacturing enterprises on its line of road, refuse to make personal delivery of the material necessary to their business, at their depots, erected for the purpose, and require them to accept delivery a mile distant, at the depot of and through a rival and competing establishment? Or may such railroad company establish a 'union coal yard' in this city, and constitute it its depot for the delivery of coal, and thus impose on all the coal dealers in the city, with whom it has side connections, the labor, expense, and delay of carting their coal sup-

[4] Vincent v. Chicago & A. R. R., 49 Ill. 33 (1868); Chicago & N. W. R. R. v. People, 56 Ill. 365 (1870).

[5] 3 Fed. 775, B. & W. 251 (1880).

plies from such general delivery to their respective yards? Or may such railroad company, in like manner, discriminate between grain elevators in the same place,—constitute one elevator its depot for the delivery of grain, and force competing interests to receive from and transfer the grain consigned to them through such selected and favored channel?"

§ 220. Reception of live stock.

In the extract just given, live stock was included among the bulky articles which a carrier must receive and deliver beside its track. This is, however, not correct. The cost of transporting live stock through a town to a single station is not prohibitive, since the animals go on their own legs and do not require hauling or repacking. It is therefore permissible for the carrier to establish a station for the reception of live stock, provided such a station is properly equipped for the purpose and furnishes sufficient facilities for the neighborhood.[6]

TOPIC D—TRANSPORTATION MUST BE DEMANDED AT A PROPER PLACE.

§ 221. Tender for carriage must be at the proper place.

Though a carrier may receive goods or passengers at any point on its line where they may be tendered, it is always possible for a carrier to impose proper and reasonable conditions as to the place where goods or passengers shall be received; and most modern carriers do impose such conditions. This is commonly done by the establishment of stations.

Where a station is properly established by a reasonable regulation of the carrier, tender for carriage must be made at the

[6] Covington Stock-Yard Co. v. Keith, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. 461, B. & W. 256 (1891); Butchers' & D. S. Y. Co. v. Louisville & N. R. R., 67 Fed. 351, 14 C. C. A. 290, 31 U. S. App. 252 (1895); Walker v. Keenan, 73 Fed. 755, 19 C. C. A. 668, 34 U. S. App. 691 (1896).

station. It was accordingly held that the statutory penalty for refusing to receive freight cannot be recovered of a railroad company where the refusal to receive was not at a regular depot or station, but at a house and platform where freight was sometimes received, but where there was neither office nor books, and where bills of lading and receipts were not given.[1]

§ 222. Extent of the carrier's route.

A carrier cannot be compelled to receive goods, still less to send and get goods, at a point off his line.

The carrier's route, of course, may cover all parts of a town. So, in the case of an express company the carrier often undertakes to call at any part of the town for goods. But his obligation even then extends no further than he has by rule or usage placed the limits of his route; and he cannot be required to call for packages at a place beyond those limits, though the limits in another direction are placed further away from his office,[2] "while it would not be competent for a common carrier to discriminate against shippers within its fixed limits, it is not perceived why, if the company is entitled to limit its receipt of goods to its own office or place of business, it may not enlarge these limits at its discretion without being bound to go beyond them."[3]

§ 223. The establishment of stations must be reasonable.

In the absence of action of the company establishing stations, and making it a condition of receiving persons or goods that they should present themselves or be offered at a station, it would seem clear that the carrier cannot refuse a tender made at any point of his route; and such was undoubtedly the case with the earlier carriers, the wagons, the stage-coaches, and in fact

[1] Kellogg v. Suffolk R. R., 100 N. C. 158, 5 S. E. 379 (1888).

[2] Bullard v. American Exp. Co., 107 Mich. 696, 65 N. W. 551, 33 L. R. A. 66 and note (1895).

[3] Montgomery, J., in Bullard v. American Exp. Co., *supra*.

all carriers before the adoption of steam as the motive power of carriage. If this is true, the establishment of stations must be accomplished by an affirmative act of the carrier, a regulation of his business, which like all regulations must be reasonable in order to give him a defence for failure to do what would otherwise be his public duty. It would follow that if a carrier does not establish a station where it is reasonably required, the carrier would have no excuse for refusing to receive persons or goods there, and that the person suffering from such refusal could maintain an action for it and recover damages.

§ 224. Establishment of stations by legislation.

It is everywhere agreed that the State may by statute establish stations at places where the public need requires them,[4] either by special statute or by some statute empowering a railroad commission to act in the premises.

"If the directors of a railroad were to find it for the interest of the stockholders to refuse to carry any freight or passengers except such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations or do any way business for that reason, though the road passed for a long distance through a populous part of the State, this would be a case manifestly requiring and authorizing legislative interference under the clause in question. And on the same ground, if they refuse to provide reasonable accommodation for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the

[4] Atchison, T. & S. F. R. R. v. Denver & N. O. R. R., 110 U. S. 667, 681, 23 L. Ed. 292, B. & W. 265 (1884, semble); Board of Commrs. v. Missouri Pac. Ry. (Kan.), 80 Pac. 53 (1905); Morgan's Va. & T. R. R. & S. S. Co. v. Railroad Commission (Va.), 33 So. 214 (1903); Commimssioners v. Portland & O. R. R., 63 Me. 269, 18 Am. Rep. 208 (1872); Commonwealth v. Eastern Railroad, 103 Mass. 254, 4 Am. Rep. 555 (1869); People v. New York, L. E. & W. R. R., 104 N. Y. 58, 66, 58 Am. Rep. 484, 9 N. E. 856 (1887, semble).

charter confers upon the directors, so as to make the duty to provide the accommodation absolute. Whether a reasonable ground for interference is presented in any particular case is for the legislature to determine; and their determination on this point must be conclusive. . . . It is a modification of the charter, within the fair interpretation of the power reserved to the legislature in the charter, and merely requires them to provide what the legislature regards as a reasonable accommodation to the public in a particular locality where they are using property which they have taken for that purpose."[5]

§ 225. Requirement of stations by the courts; conservative view.

Whether the carrier can be required to establish reasonable stations through judicial process in the courts is a matter of more doubt. This might conceivably be done directly, through the writ of mandamus (or mandatory injunction) or indirectly by giving damages to an individual injured by refusal to stop at a proper place.

The leading authorities on this side of the question are two important decisions of the Supreme Court of the United States. The earlier of these cases was that of the Atchison, Topeka and Santa Fe Railroad v. the Denver & New Orleans Railroad.[6] There was a physical junction of the two roads about three-quarters of a mile from the regular station of the Atchison road in the city of Pueblo; and the Denver road brought this bill for a mandatory injunction requiring (among other things) that the Atchison road should establish a station to receive and deliver passengers and freight at the point of junction. The injunction was granted in the Circuit Court, but the decree was reversed on appeal by the Supreme Court.

The second case was that of the Northern Pacific Railroad

[5] Chapman, C. J., in Commonwealth v. Eastern R. R., *supra.*
[6] 110 U. S. 667, 23 L. Ed. 292, B. & W. 265 (1884).

v. Washington.[7] This was a petition by the Territory of Washington for a mandamus to compel the defendant railroad to erect and maintain a station at Yakima City, through which the road passed. The facts were as follows: The defendant at one time stopped its trains at Yakima City, but never built a station there, and, after completing its road four miles further, to North Yakima, established a freight and passenger station at North Yakima, which was a town laid out by the defendant on its own unimproved land, and thereupon ceased to stop its trains at Yakima City. In consequence, apparently, of this, Yakima City, which at the time of filing the petition for mandamus, was the most important town, in population and business, in the county, rapidly dwindled, and most of its inhabitants removed to North Yakima, which at the time of the verdict had become the largest and most important town in the county. The Territorial court granted the writ, but this judgment was reversed on appeal by the Supreme Court of the United States. The decision was made in view of the fact that Yakima City had ceased to be a sufficiently considerable place to require station facilities. "The question whether a mandamus should issue to protect the interest of the public does not depend upon a state of facts existing when the petition was filed, if that state of facts has ceased to exist when the final judgment is rendered. In this regard, as observed by Lord Chief Justice Jervis in Railway Co. v. Queen,[8] 'there is a very great difference between an indictment for not fulfilling a public duty, and a mandamus commanding the party liable to fulfil it.'"

It is therefore not actually decided in the case that the railroad had not violated its legal duty in failing to stop at Yakima City, or that some form of action might not lie against it for the failure. The court, however, discussed the general

7 142 U. S. 492, 35 L. Ed. 1092, 12 Sup. Ct. 283, B. & W. 231 (1892).
8 1 E. & B. 878 (1853).

question very fully, and concluded that "to hold that the directors of this corporation, in determining the number, place, and size of its stations and other structures, having regard to the public convenience as well as to its own pecuniary interests, can be controlled by the courts by writ of mandamus, would be inconsistent with many decisions of high authority in analogous cases."

§ 226. Progressive view of the question of stations.

The progressive view of the question is taken in several courts, which allow the writ of mandamus to issue to compel the railroad to establish stations in reasonable places. A leading case is that of the People v. Chicago and Alton Railroad.[9] This was a petition for a writ of mandamus to compel the defendant to establish and maintain a station at Upper Alton. The court stated the facts as follows: "It cannot be doubted, we think, that the facts alleged make out a clear and strong case of public necessity. They show that Upper Alton is a town of over 1,800 inhabitants, situated on the line of the defendant's railway about midway between two other stations seven miles apart. The residents of the town and vicinity are shown to be possessed of at least the ordinary inclination to travel by railway, and it is averred that many of them have occasion and desire to travel by the defendant's railway between Upper Alton and other points on the line of said railway. Various manufacturing and other business enterprises are shown to be carried on within the town, creating a necessity for the use of said railway for the transportation of manufactured articles, merchandise, and other freights. To avail themselves of transportation upon trains which pass by their doors, the inhabitants of Upper Alton are compelled to go and transport their freights by other conveyances to a neighboring town about three and one-half miles away."

[9] 130 Ill. 175, 22 N. E. 857, B. & W. 226 (1889).

On these facts, the court held that the alternative writ should issue. Mr. Justice Bailey said: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public. Railway companies, though private corporations, are engaged in a business in which the public have an interest, and in which such companies are public servants, and amenable as such.

"As we have already said, the petition directly avers, and the demurrer admits, that the accommodation of the public living in and near said town requires, and long has required, the establishment of a passenger and freight depot on the line of its road within said town. Unless, then, there is some explanation for the course pursued by the defendant which the record does not give, we cannot escape the conviction that its conduct in the premises exhibits an entire want of good faith in its efforts to perform its public functions as a common carrier, and an unwarrantable disregard of the public interests and necessities. It cannot be admitted that the discretion vested in the defendant in the matter of establishing and maintaining its freight and passenger stations extends so far as to justify such manifest and admitted disregard of its duties to the public."

This case has been followed in Illinois,[10] and the same conclusion has been reached in other States.[11] In New Hampshire

[10] Mobile & O. R. R. v. People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556, B. & W. 230 (1890), where, however, the petitioner failed to make out a case on the facts.

[11] State v. Republican Valley R. R., 17 Neb. 647, 26 N. W. 329, 52 Am. Rep. 424 (1885); Chicago & N. W. R. R. v. State (Neb.), 103 N. W. 1087

it was held that a writ would issue, under certain circumstances, to compel the defendant railroad to join with the relator in erecting and maintaining a union station in the city of Manchester.[12] In an opinion, written by Mr. Chief Justice Doe, but delivered per Curiam after his death, the court said: "It is conceded that the public good requires that there should be a union passenger station in the city of Manchester, to be used by the railroads connecting at that point, for the accommodation of the public, as well as for their own convenience and advantage. From this concession it necessarily follows that it is the legal duty of the parties to locate, erect and maintain such a depot as public necessity requires. The fact that they are unable to agree upon a suitable location does not relieve them from that duty."

§ 227. Carriers between certain stations only.

There is some authority in the English cases for the proposition that a carrier may limit his undertaking not only as to the nature of the goods carried, but also as to the points between which he will carry certain goods; so that, for instance, a railway having established three stations, and being a carrier of both coal and iron, might be a common carrier of iron between stations 1 and 2 only, and of coal between stations 2 and 3 only, refusing to receive for carriage iron at station 3 and coal at station 1. Thus, in Johnson v. Midland Railway,[13] Baron Parke said "He may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places." And following this opinion the Court of Common Pleas, In re Oxlade and the Northeastern Railway,[14] held it competent for the railway to restrict their coal traffic to the carriage of coal for col-

(1905); Concord & M. R. R. v. Boston & M. R. R., 67 N. H. 464, 41 Atl. 263, B. & W. (1893).

[12] Concord & M. R. R. v. Boston & M. R. R., *supra*.

[13] 4 Ex. 367 (1849).

[14] 15 C. B. N. S. 680 (1864).

liery owners from the pit's mouth to stations where such colliery owners have sales or depots appropriated to them for the reception and sale of their coals, and to decline to carry coals from station to station, or for coal merchants; such an arrangement, as they found, being essential to the regulation of the large traffic in that article.

Chief Justice Earle said: "I am of opinion, seeing the large amount of traffic in coals upon the North Eastern Railway—upwards of 8,000,000 tons per annum—there is very good reason for the company saying that they will carry coals for colliery owners only. These may wait until the company are ready to receive them; but coals belonging to others, when once afloat on the line, are not managed with the same facility. . . . I think the company have a perfect right to say that they will carry coals only for colliery owners."

Although this case was cited with approval and made the basis of the decision of a recent case in the Federal Circuit Court,[15] it is very doubtful whether it has ever represented the law in the United States. The spectacle of a railroad permitted to carry for every colliery-owner on its route, yet to refuse to carry for a private owner, would hardly appeal to the sense of law and justice of an American court. Nor would the more general suggestion, that a carrier could (for one class of goods or for all goods) refuse to become a common carrier at a way-station, meet with much more favor. If the coal of a private owner or goods tendered at a way station can be refused, the refusal must be grounded upon some legal excuse, not upon a denial that the common carrier's obligation exists.

[15] Harp v. Choctaw, O. & G. Ry., 118 Fed. 169 (1902). This was affirmed on a different ground, 125 Fed. 445, 61 C. C. A 405 (1903).

CHAPTER VIII.

EXCUSES FOR REFUSAL TO SERVE.

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§ 231. General principles governing excuses.

Although, as has been seen, it is the duty of those in public calling to serve all who apply that are within the public profession, who have fulfilled all conditions precedent unless there is justification, yet there are many and various excuses for

not serving particular applicants. All this preliminary matter simply makes out a *prima facie* case for a particular applicant. If serving the particular applicant might involve the company serving in legal difficulties, the company ought to refuse to act; and so, for another example, if the particular applicant might endanger other people that are being served, it would again furnish an excuse for refusal to serve.

TOPIC A—ILLEGALITY INVOLVED IN SERVICE.

§ 232. Duty not to abet illegality.

A carrier of passengers could, of course, refuse to assist a thief in his flight. And in an analogous case it was assumed that the carrier might refuse to take a rebel officer going to the front to join his command.[1] So a carrier of goods may refuse to receive from a thief or to abet an enemy; but if the carrier does not know of the illegal nature of the request he is not legally liable for taking passengers or goods according to his *prima facie* duty.[2] Thus it is not conversion against the true owner unless the true owner intervenes before the goods are delivered and demands them.[3] But a railroad company which negligently permitted slaves to be transported without the authority of their owner, was held liable for their value by reason of being concerned in their escape.[4] These cases show in a preliminary way the nature of the problem.

§ 233. No right to exclude unless illegally involved.

A closer case because nearer the line which separates an application proper in itself from an application improper in itself is Pearson v. Duane,[5] the facts in which follow:

1 Turner v. N. C. R. R., 63 N. C. 522 (1869).

2 Jackson v. Railway Co., 87 Mo. 422, 56 Am. Rep. 460 (1885).

3 White Live Stock Commission Co. v. Chicago, M. & St. P., 87 Mo. App. 330 (1885).

4 Louisville Ry. v. Young, 1 Bush (Ky.), 401 (1866).

5 4 Wall. 605, 18 L. Ed. 447, B. & W. 110 (1867).

In the month of June, 1856, the steamship Stevens, a common carrier of passengers, of which Pearson was master, on her regular voyage from Panama to San Francisco, arrived at the intermediate port of Acapulco, where Duane got on board, with the intention of proceeding to San Francisco. He had, shortly before this, been banished from that city by a revolutionary yet powerful and organized body of men, called "The Vigilance Committee of San Francisco," upon penalty of death in case of return. Pearson ascertained that Duane had been expelled from California, and put Duane aboard the steamer Sonora. Duane filed a libel in admiralty for damages.

If this had been banishment pronounced by an established government there would seem to be no doubt that the application to be transported back would be improper and that the applicant could be refused at the outset or after he had been accepted as a passenger that he might be expelled. But since it was not, it would seem that he had a right to return, whatever might be the consequences to him. The court deal with the question in hand in a rather hesitant way. The beginning of the opinion of Mr. Justice Davis follows: "This case is interesting because of certain novel views which this court is asked to sustain. Two questions arise in it: 1st, was the conduct of Pearson justifiable? 2d, if not, what should be the proper measure of damages? It is contended, as the life of Duane was in imminent peril, in case of his return to San Francisco, that Pearson was justified, in order to save it, in excluding him from his boat, notwithstanding Duane was willing to take his chances of being hanged by the Vigilance Committee. Such a motive is certainly commendable for its humanity, and goes very far to excuse the transaction, but does not justify it. Common carriers of passengers, like the steamship Stevens, are obliged to carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal. If there are reasonable objections to a proposed passenger, the carrier is not required to

take him. In this case, Duane could have been well refused a passage when he first came on board the boat, if the circumstances of his banishment would, in the opinion of the master, have tended to promote further difficulty, should he be returned to a city where lawless violence was supreme. But this refusal should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board."

§ 234. When refusal is made necessary by law.

It is most obvious that when the refusal to serve is made necessary by the law that there is an excuse. An interesting case in point is Decker v. Atchison, Topeka and Santa Fe Railroad Company.[6] The plaintiff was not given the transportation he demanded upon the morning in question because on the 16th day of September, 1893, the defendant railroad company had prescribed a certain rule for the government of its trains entering the Cherokee Outlet on the day of its opening for settlement, providing that no train should enter said outlet within six hours of 12 o'clock noon of said day.

Mr. Justice Scott held this refusal under these circumstances to be entirely justifiable; he said: "Was this rule prescribed by the defendant in error on the 16th day of September, 1893, a reasonable rule? The opening of the Cherokee Outlet to settlement has gone down into history as a scene and an occasion unequaled by any similar event of modern times. A vast domain was opened to homestead settlement in a day, and more than 100,000 people waited upon the borders for the hour of noon, when they could break forth on a wild rush for either town lots or homestead lands. At the particular point where the trains of the defendant in error were located, thousands

[6] 3 Okla. 553, 41 Pac. 610 (1885).

thronged to board the first train to enter, and, if possible, gain some advantage and get to the promised land before the awful rush. Had trains gone into the country prior to 12 o'clock, hundreds would have become violators of the law, no doubt, and, had the defendant in error permitted those already aboard when the trains arrived at the line to remain in the coaches, those waiting on the line to enter trains according to the order of the secretary of the interior and the rules prescribed by the company would have been placed at a disadvantage, and their rights under the law would have been unequal and prejudiced thereby. Yes, this rule was a reasonable one, and, in addition to this, was adopted by defendant in error by order of the secretary of the interior; and for this court to hold, or the court below to have held, as a matter of law, that it was an unreasonable rule, would, we think, have been error."

§ 235. Whether excused from serving by Sunday laws.

If a carrier is forbidden by law to carry on Sunday, he may, of course, justify a refusal to carry.[7] If such a law is repealed, it then ceases to be illegal to carry on Sunday, and the carrier may do so if he chooses.[8] It has, however, been intimated in such a case that if the carrier does not choose to engage in business on Sunday he need not do so. "We do not understand that a railroad company or a steamboat is bound to transact business on the Sabbath merely because the statute permits it to be done; but if they hold themselves out to the public as so doing, and enter upon business which, according to their usages and habits, will be transacted on that day, they cannot shield themselves for either misfeasance or non-feasance because it was done or omitted to be done on the Sabbath." [9]

[7] Walsh v. Chicago, M. & S. P. Ry., 42 Wis. 23, 24 Am. Rep. 376 (1877).
[8] Horton v. Norwalk Tramway Co., 66 Conn. 272, 33 Atl. 914 (1895).
[9] Cooper, C. J., in Merchants' W. B. Assoc. v. Wood, 64 Miss. 661, 2 So. 76 (1887).

§ 236. Whether excused from transporting intoxicating liquors for illegal sale.

It follows from these general principles that a carrier may legally refuse to receive intoxicating liquors for delivery in a prohibition State if such delivery would be illegal.[10]

In State v. Goss [11] Mr. Justice Rowell said: "Although express companies are common carriers, and liable as such, yet the law neither requires nor permits them to do illegal acts; and they are not bound to transport and deliver intoxicating liquor or other commodities, if thereby they would commit an offence or incur a penalty. They cannot be allowed, any more than other people, knowingly and with impunity, to make themselves agents for others to break the laws of the State."

Where, however, the carriage and delivery would be legal, the carrier cannot refuse to receive the liquor. Thus, where the sale of liquor in original packages was lawful in South Carolina, though it was forbidden in any other form, the carrier could not refuse to receive liquor in the original packages for delivery in South Carolina.[12]

§ 237. Excused from carrying passengers who intend to do illegal acts.

One of the leading cases upon this question is Thurston v. Union Pacific Railroad Co.[13] Plaintiff had purchased a ticket for transportation over the defendant's line. Once when he was about starting he was prevented from boarding the train; later he entered a train but was forcibly ejected. The defendant admitted that the necessary force (but no more) was used to prevent his entering the train. It was claimed that he had been for

[10] Milwaukee M. E. Co. v. Chicago, P. I. & P. Ry., 73 Iowa, 98, 34 N. W. 761 (1887); State v. Goss, 59 Vt. 266, 9 Atl. 829, 59 Am. Rep. 706 (1887).

[11] *Supra.*

[12] Blumenthal v. Southern Ry., 84 Fed. 920 (1898).

[13] 4 Dillon (U. S.), 321, Fed. Cas. 14,019 (1877).

years a notorious gambler,—a "monteman," so-called,—and was then engaged in travelling on the defendant's road for the purpose of plying that calling, and was about to enter the train for that purpose. This the plaintiff denied. The question was, whether the defendant has the right to exclude gamblers from its trains?

Dundy, J., said: "The railway company is bound, as a common carrier, when not over-crowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form, or committing any crime; nor is it bound to carry persons infected with contagious diseases, to the danger of other passengers. The person must be upon lawful and legitimate business. Hence defendant is not bound to carry persons who travel for the purpose of gambling. As gambling is a crime under the State laws, it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying out an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling, and refusing to desist, they may be forcibly expelled. Whether the plaintiff was going upon the train for gambling purposes, or whether, from his previous course, the defendant might reasonably infer that such was his purpose, is a question of fact for the jury. If they find such to have been the case, they cannot give judgment for any more than the actual damage sustained."

TOPIC B—PROTECTION OF OTHERS SERVED.

§ 238. Exclusion of persons dangerous or annoying to other passengers.

The right of a common carrier of passengers to exclude those who are actually dangerous to the others who are being served at the same time obviously must be an inherent right in all branches of public service. Insane persons, violent persons or those who are in delirium tremens, or who have contagious disease, are obvious examples. Such persons may not only be excluded at the outset, but may also be ejected if they show signs of violence. The justification in such cases is too plain for argument. If a person on a train becomes disorderly, profane, or dangerous and offensive in his conduct, it is the duty of the conductor to expel such guilty party, or at least to assign him to a car where he will not endanger or annoy the other passengers. Whatever rules tend to the comfort, order, and safety of the passengers, the company are fully authorized to make, and are amply empowered to enforce compliance therewith. But such rules and regulations must always be reasonable and uniform in respect to persons.

§ 239. Violent persons may be excluded.

A square case in point, if one is needed, is Louisville & Nashville Railway v. Logan.[1] The material facts follow: The deceased, at night, at Lebanon, got on a passenger train, bound from Louisville to Knoxville, to go to a station where he resided, 14 miles distant. Being at the time intoxicated, he stumbled or slipped and fell on the depot platform, was helped upon the car platform, and, in the opinion of two witnesses, was too drunk to take care of himself, though he was also boisterous, profane, and disposed to be quarrelsome. He refused with an oath to pay his fare,—saying that there were not men enough

[1] 88 Ky. 232, 10 S. W. 655, 21 Am. St. Rep. 332, 3 L. R. A. 80 (1889).

on the train to put him off, at the same time pulling out his knife. This profane and threatening language caused general excitement among the passengers, some of whom were frightened, others were not. Thereupon the train crew, using only necessary force, ejected him from the train, not far from a farmhouse; he was later found dead upon the track, having been killed by some passing train.

The Court of Appeals of Kentucky held the railroad justified in all that was done. In the beginning of his opinion Chief Justice Leeds said: "Although it has been held that a railroad company is not bound to receive and carry a person who is so intoxicated as to be offensive, the power to exclude one from the right of travelling on a train, who offers to pay his fare, and though intoxicated, has not been guilty of any conduct as passenger forfeiting the right, is always subject to be called in question, and the company cannot therefore be fairly held to a strict exercise of it, except where the rights of others are involved. But, even conceding the conductor could have forcibly, and without incurring any legal liability to him, kept the deceased off the train at Lebanon, and committed an error in failing to do it, we do not see how on that account the right was impaired, or the duty lessened, to put him off at any place or time afterwards when his behavior rendered it legal and necessary. And if the deceased, for whose drunken state the company was in no way responsible, acted so as to justify and require his expulsion, it would be a harsh rule to make the company liable, if not otherwise so, merely because the conductor did not assume the risk and responsibility of deciding, even if aware of the fact, that he was too much intoxicated to be allowed to go upon the train at Lebanon. The law makes it the duty of a railroad company to use all reasonable care in operating trains for both the safety and protection from molestation and insult of passengers; otherwise orderly and infirm persons and females, who, upon the faith of such protection, frequently travel unattended, would have no security against turbulent, bad men. And as it is obvious a

train must be run with skill and system in order to assure safety and comfort, the conduct of any one who interferes with the management, or without just cause attempts to do bodily injury to, or put in fear, those in charge, is reprehensible, and unlawful."

On this general principle one may be excluded who has or is on the verge of having delirium tremens.[2]

§ 240. Insane persons may be excluded.

As to the case of insane persons, some distinctions are necessary. These are well brought out in the case of Owens v. Macon & B. R. R. Co.,[3] which was an action brought for refusal to transport a lunatic in charge of a guard. When they were about to board the train the lunatic made a great outcry and began to swear, struggling all the while. The order was therefore given not to allow him to go on by this passenger train; but permission was given to take him by a freight train following.

Mr. Justice Lamar, writing the opinion of the Supreme Court, held the carrier justified. His opinion follows: "This was a suit by one of the guards in charge of a lunatic, but it was conceded on the argument here that he could not recover if the company was justified in refusing to transport the lunatic, and we shall therefore consider what was the carrier's obligation to the insane man. The relation of carrier and passenger creates reciprocal duties. One is bound safely to transport; the other, to conform to all reasonable regulations, and so to conduct himself as not to incommode other passengers who have an equal right to a safe and comfortable passage. Those who so act as to be obnoxious may be refused transportation or ejected. The payment of fare and the possession of a ticket do not require the carrier to transport those who are noisy or boisterous, or who

[2] King v. Ohio & M. Ry., 22 Fed. 413 (1884); Atchison, T. & S. F. R. R. v. Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543 (1885).

[3] 119 Ga. 230, 46 S. E. 87 (1903).

threaten the safety of, or occasion inconvenience to, others on the train. But in the case of unfortunates who are not responsible for their disorderly conduct, and who, at best, are involuntary passengers, a different question is presented, calling in each case for the exercise of a wise discretion. On the one hand, regard must be had for the safety and comfort of other travellers, and, on the other, to the fact that in losing his mind the lunatic has not lost the right to be transported. It may be vitally important that he be taken to a place where he can receive the attention and confinement rendered necessary by his mental state. The carrier cannot absolutely refuse transportation to insane persons, but it may in all cases insist that he be properly attended, safely guarded, and securely restrained. And even where such precautions have been taken, it is not bound to afford him, if violent, transportation in the cars in which other travellers are being conveyed. And while there may be cases in which the convenience of other passengers should yield to the necessities of the unfortunate, the company may decline to receive one who at the time of entering the train exhibits signs of violence which indicate that his presence and conduct would tend to the manifest annoyance of others. So to do would ordinarily be better than to receive him on the promise of his attendants that he would be quiet, and, on the disorder continuing, force upon the carrier the duty of deciding whether he should be ejected at a station where there might not be proper accommodations. Where, however, it becomes essential to transport one who, though violent and noisy, is not responsible for his actions, the company is entitled to seasonable notice, in order that it may make proper arrangements. The action of the defendant in the present case in offering transportation on a later train, whereon others would not be incommoded, was in strict fulfillment of its double duty to the lunatic and the general public. It could not be required to place him in the baggage car, which was not intended for passengers. If the attendants were unwilling for him to be taken in the cab of the freight train, they were at least

bound to give the carrier an opportunity to make other arrangements.[4]

§ 241. How intoxicated persons must be treated.

According to the general principles governing the proper conduct of a public service, it would seem plain that a carrier may be justified in refusing to transport an intoxicated person. Such persons are apt to be dangerous and likely to be unruly. If they are in such a state it would seem plain that they may be rejected. And it seems equally clear that if they show signs of being obnoxious they may be ejected. Upon this matter there is a considerable body of authority.

One leading case is Vinton v. Middlesex Street Railway Co.[5] This was an action brought for ejecting a passenger. The defendant railway introduced evidence tending to show that at the time of the expulsion the plaintiff, intoxicated and using loud and profane language, was attempting to strike at the conductor. At the trial the judge ruled that the conductor had no right to eject unless the actual conduct of the plaintiff at the time was offensive or annoying to the passengers.

The Supreme Court—Mr. Chief Justice Bigelow writing the opinion—held this view too limited: "It being conceded, as it must be under adjudicated cases, that the defendants, as incident to the business which they carried on, not only had the power but were bound to take all reasonable and proper means to insure the safety and provide for the comfort and convenience of passengers, it follows that they had a right, in the exercise of this authority and duty, to repress and prohibit all disorderly conduct in their vehicles, and to expel or exclude therefrom any person whose conduct or condition was such as to render acts of impropriety, rudeness, indecency or disturbance, either inevi-

[4] Meyer v. St. Louis Ry., 54 Fed. 116, 4 C. C. A. 221, 10 U. S. App. 677 (1893), is to the same effect.

[5] 11 Allen (Mass.), 304, 87 Am. Dec. 714 (1865).

table or probable. Certainly the conductor in charge of the vehicle was not bound to wait until some overt act of violence, profaneness or other misconduct had been committed, to the inconvenience or annoyance of other passengers, before exercising his authority to exclude or expel the offender. The right and power of the defendants and their servants to prevent the occurrence of improper and disorderly conduct in a public vehicle is quite as essential and important as the authority to stop a disturbance or repress acts of violence or breaches of decorum after they have been committed, and the mischief of annoyance and disturbance have been done. Indeed, if the rule laid down at the trial be correct, then it would follow that passengers in public vehicles must be subjected to a certain amount or degree of discomfort or insult from evil-disposed persons before the right to expel them would accrue to a carrier or his servant. There would be no authority to restrain or prevent profaneness, indecency, or other branches of decorum in speech or behavior, until it had continued long enough to become manifest to the eye or ears of other passengers. It is obvious that any such restriction on the operation of the rule of law would greatly diminish its value."

The general law stated in this opinion is well established; those who are engaged in serving the public may well justify themselves for refusing to serve persons so intoxicated as to be dangerous or obnoxious to the others who are being served at the same time. It is not the mere fact of intoxication that disables the person from requiring service; it is the fact that he is obnoxious to the others. Therefore the mere fact that he has been drinking is not enough; he must be shown to be so intoxicated as to be irresponsible. Such intoxicated persons may be refused service at the outset, or they may be refused further service at any time. The same reasons that justify rejection at the outset, if necessary, excuse, it would seem, ejection at any later stage when necessary. But, of course, in the latter case a certain de-

gree of care must be observed as to the manner and place of ejection; although according to most of these cases the degree of care required is not very high.[6]

[6] *United States.*—Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. 7,258 (semble), B. & W. 100 (1835).

Alabama.—Johnson v. Louisville & N. R. R., 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39 (1894).

District of Columbia.—Converse v. Washington & G. R. R., 2 MacAr. 504 (1876).

Georgia.—Peavey v. Ga. Ry., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334 (1888).

Illinois—Chicago City Ry. v. Pelletier, 134 Ill. 120, 24 N. E. 770 (1890).

Indiana.—Baltimore, P. & C. R. R. v. McDonald, 68 Ind. 316 (1879); Pittsburg, C. & S. L. Ry. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68 (1877); Cincinnati, I., St. L. & C. R. R. v. Cooper, 120 Ind. 469, 22 N. E. 340, 16 Am. St. Rep. 334, 6 L. R. A. 241 (1889).

Kansas.—Atchison, T. & S. F. R. R. v. Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543 (1885).

Maine.—Robinson v. Rockland Ry., 87 Me. 387, 32 Atl. 994, 29 L. R. A. 530 (1895).

Massachusetts.—Vinton v. Middlesex R. R., 11 Allen, 304, 87 Am. Dec. 714 (1865); Murphy v. Union Ry., 118 Mass. 228 (1875); O'Laughlin v. Boston & Me. R. R., 164 Mass. 139, 41 N. E. 662 (1895); Hudson v. Lynn & B. R. R., 178 Mass. 64, 59 N. E. 647 (1901).

Michigan.—Strand v. Chicago & W. M. Ry., 67 Mich. 380, 34 N. W. 712 (1887).

Missouri.—Eades v. Metropolitan Ry., 43 Mo. App. 536 (1891).

New Hampshire.—Edgerly v. Union St. Ry., 67 N. H. 312, 36 Atl. 558 (1892).

New York.—People v. Caryl, 3 Park Cr. 326 (1857); Milliman v. New York C. & H. R. R. R., 66 N. Y. 642 (1876); Freedon v. New York C. & H. R. R. R., 24 App. Div. 306, 48 N. Y. Supp. 584 (1897).

Pennsylvania.—McHugh v. Schlosser, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574 (1894).

Texas.—Missouri Pac. Ry. v. Evans, 71 Tex. 361, 1 L. R. A. 476 (1888).

Washington.—Stevenson v. West Seattle Co., 22 Wash. 84, 60 Pac. 51 (1900).

West Virginia.—Fisher v. West Virginia Co., 42 W. Va. 183, 24 S. E. 570, 33 L. R. A. 69 (1896).

§ 242. Exclusion of indecent and profane persons.

In accordance with these principles it is established that indecent or profane persons may be excluded by carriers for the protection of the other passengers.[7]

And if there is reason to believe that the person if allowed to enter the carrier's vehicle will so obscenely conduct himself as to become a nuisance to the other passengers he may be excluded. Thus it has been held that when a woman is suing a carrier for refusal to receive her as a passenger, and it appears that she was refused because on her application for passage she declined to promise "to behave herself," evidence is admissible "that prior to this the plaintiff, while a passenger upon its boat, had been guilty of gross, obscene and vulgar language and indecent conduct in the presence of other passengers, including ladies; that at times she would conduct herself properly for a part of the voyage, and then become disorderly on other portions of the same voyage; that, if sober going to West Seattle, she almost invariably returned in a state of intoxication." [8]

§ 243. Exclusion of persons who bring dangerous or obnoxious articles to the vehicle.

The carrier is justified in excluding from the vehicle any person who insists upon bringing into it articles that are dangerous or obnoxious to other passengers. Thus, one may be refused

[7] Chicago City Ry. v. Pelletier, 134 Ill. 120, 24 N. E. 770 (1890); Louisville & N. Ry. v. Logan, 88 Ky. 232, 10 S. W. 655, 21 Am. Rep. 332 (1889); Robinson v. Rockland T. & C. S. Ry., 87 Me. 387, 32 Atl. 994, 29 L. R. A. 530 (1895); Vinton v. Middlesex St. Ry., 11 Allen, 304, 87 Am. Dec. 714 (1865); Eads v. Metropolitan St. Ry., 43 Mo. App. 536 (1891); People v. Caryl, 3 Park Cr. (N. Y.) 326 (1857); Atchison, T. & S. F. Ry. v. Wood, 77 S. W. 964 (1903).

[8] Stevenson v. West Seattle, L. & I. Co., 22 Wash. 84, 60 Pac. 51 (1900). But see Louisville, N. H. & C. Ry. v. Wolfe, 128 Ind. 347, 27 N. E. 606, 25 Am. St. Rep. 436 (1891).

entrance to a car or boat who has with him two guns with bayonets.[9]

For the same reason a rule is proper and legal which includes from a passenger-car a person accompanied by a dog[10] or a goat.[11]

TOPIC C—APPLICANT UNDER DISABILITY.

§ 244. How far blind persons may be excluded.

A blind person who, because of his blindness is unable to take care of himself, may be excluded from the carrier's vehicle, since it is outside the carrier's profession to care for helpless persons; but if the blind man is able to care for himself he must be received.[1] Thus, in Zachery v. Mobile & Ohio Railroad,[2] Mr. Justice Whitefield said: "It is not every sick or crippled or infirm person whom a railroad regulation can exclude, but one so sick or so crippled or so infirm as not to be able to travel without aid. And so it is not every blind person, but one who, though blind, is otherwise incompetent to travel alone on the cars; otherwise, we would be compelled to hold that one suffering from sickness, no matter how slight, or one who had lost an arm or leg, or one, no matter how active physically, and no matter how expert a traveller, if merely blind, could be shut out by such a rule. And this ought not to be, and cannot be sound law. We are asked to hold that a regulation that no blind person whatever, no matter how skillful or expert a traveller he may have been, or may be, and no matter how perfectly qualified in every other respect, may travel on cars unaccompanied, is a reasonable

[9] Dowd v. Albany Railway, 47 N. Y. App. Div. 202, 62 N. Y. Supp. 179 (1900). And see Flint v. Transportation Co., 6 Blatch. 158, Fed. Cas. No. 4,873, 34 Conn. 554, 20 Am. Law Rep. 569 (1868).

[10] Gregory v. Chicago & Mo. R. R., 100 Iowa, 345, 69 N. W. 532 (1896).

[11] Daniel v. New Jersey S. Ry., 64 N. J. Law, 603, 46 Atl. 625 (1900).

[1] Zachery v. Mobile & O. R. R., 75 Miss. 751, 23 So. 435, 65 Am. St. Rep. 617, 41 L. R. A. 385 (1898); Illinois Central R. R. v. Smith, 85 Miss. 349, 37 So. 643 (1905).

[2] *Supra.*

rule. This cannot be sound. Each case must depend on its own facts, and the reasonableness of the refusal to sell the blind person a ticket must, on principle, depend, not on a universal, arbitrary, and undiscriminating rule, like this one, but on the capacity to travel unaccompanied of the particular blind person, as shown by the proof on that point in his case."

In Illinois Central Railroad v. Smith,[3] Mr. Justice Truly, after quoting this language, added: "Primarily the affliction of blindness unfits every person for safe travel by railway, if unaccompanied. No blind person without previous experience could possibly accommodate himself to the many exigencies incident to travel by railroad, or guard himself against peril in boarding and alighting from trains; changing from one train to another, or threading his way in safety across the railway tracks at crowded stations. Hence the rule which provides that every blind person is presumed to be, in the absence of proof of experience, unfit to travel alone, is not unreasonable. Nor do we consider such a regulation a hardship upon the persons afflicted with blindness or other disabling physical infirmity. It is rather a safeguard thrown around them for their own protection. Therefore, when a blind person applies to purchase a ticket, being himself unknown to the agent,[4] and that ticket is refused, the carrier is not liable by this act alone to be mulcted in damages; but, as before indicated, if the agent of the carrier knows of his personal knowledge of the competency to travel of the particular person, or if the fact of such ability is made known to him in any manner, and he still persists wantonly and arbitrarily in his refusal to sell the person desiring passage a ticket, the carrier may be made to respond in damages for his oppressive act. And it is the duty of the agent of the carrier to listen to the explanation made by the person desiring to purchase a ticket, and judge of his competency in light of the facts then made known to him."

[3] *Supra.*

[4] Accord. Illinois C. Ry. v. Allen (Ky.), 89 S. W. 150 (1905).

§ 245. **How sick persons must be treated.**

It would seem to be plain that a public servant is under no obligation to accept a person violently sick, especially a person infected with contagious disease. On the other hand, if a person, ill or disabled and not dangerous or obnoxious to others, presents himself, with proper attendance provided by himself, it seems right to require that he shall be given adequate service.[5] If such an ill person is accepted then a duty to take special care arises from the new risk, if known; otherwise if it is not known.[6]

This is a merciful rule, requiring of the public servant due care of the person whom he has accepted, even in so unforeseen

[5] *United States.*—Thurston v. N. P. R. Co., 4 Dill. 321 (semble), Fed. Cas. 14,019 (1877); Paddock v. Atchison, T. & S. F. R. R., 37 Fed. 841, 4 L. R. A. 231 (1889).

Indiana.—Columbia Ry. v. Powell, 40 Ind. 37; Louisville, N. R. R. v. Crunk, 119 Ind. 542, 21 N. E. 31, 92 Am. St. Rep. 443 (1889).

Minnesota.—Croom v. Chicago, M. & St. P. Ry., 52 Minn. 296, 53 N. W. 1128, 38 Am. St. Rep. 557, 18 L. R. A. 602 (1893).

Mississippi.—Sevier v. Vicksburg & M. R. R., 61 Miss. 48, 48 Am. Rep. 74 (1883); Zachery v. Mobile & O. R. R., 75 Miss. 746, 23 So. 434, 65 Am. St. Rep. 617, 41 L. R. A. 385 (1898).

Tennessee.—Louisville & N. R. R. v. Fleming, 14 Lea, 128 (1884).

Wisconsin.—Walsh v. Chicago, M. & St. P. Ry., 42 Wis. 23, 24 Am. Rep. 376 (1877).

[6] *District of Columbia.*—Lemont v. W. & G. R. R., 1 Mackey, 180 (1881).

Illinois.—Illinois Cen. Ry. v. Sutton, 53 Ill. 397 (1870).

Indiana.—Louisville, etc., R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31 (1889).

Louisiana.—Conolley v. Crescent City R. R., 41 La. Ann. 57, 5 So. 259, 17 Am. St. Rep. 389, 3 L. R. A. 133 (1889).

Massachusetts.—Lucas v. Railroad Co., 6 Gray 64 (1856).

New Hampshire.—Foss v. Boston & M. R. R., 66 N. H. 256, 21 Atl. 222, 49 Am. St. Rep. 607, 11 L. R. A. 367 (1890).

New Jersey.—McCann v. Newark, etc., R. Co., 58 N. J. L. 642, 34 Atl. 1052, 33 L. R. A. 127 (1896).

New York.—Sheridan v. Brooklyn Cy. & N. R. R., 36 N. Y. 39, 93 Am. Dec. 490 (1867).

Texas.—St. Louis, etc., R. Co. v. Finley, 79 Tex. 85, 15 S. W. 266 (1890).

an exigency. Of course those persons who have been taken with disease may properly be segregated from the others, which will be particularly true in case of contagious disease. And such persons may at convenient times be given over to proper attendance.[7]

TOPIC D—REFUSAL UPON PERSONAL GROUNDS.

§ 246. General obligations to serve all.

One who is engaged in public calling must by virtue of his public duty serve many whom he is very unwilling to serve,[1] for one reason or another. A company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Whatever discriminations are made must be on some principle, or for some reason, that the law recognizes as just and equitable, and founded in good public policy. What are reasonable rules is a question of law, and is for the court to determine, under all the circumstances in each particular case.

[7] *United States.*—The Steamship Hammonia, 10 Ben. 512, Fed. Cas. 6,006 (1879); Paddock v. Atchison, T. & S. F. R. R., 37 Fed. 841, 4 L. R. A. 231 (1889).

District of Columbia.—Lemont v. W. & G. R. R., 1 Mackey, 180.

Illinois.—Illinois Cen. R. R. v. Sutton, 53 Ill. 397 (1870).

Louisiana.—Conolley v. Crescent City R. R., 41 La. Ann. 57, 5 So. 259, 17 Am. St. Rep. 389, 3 L. R. A. 133 (1889).

Massachusetts.—Lucas v. New Bedford & T. R. R., 6 Gray, 64, 66 Am. Dec. 406 (1856).

Mississippi.—New Orleans, J. & G. N. R. R. v. Stratham, 42 Miss. 607, 97 Am. Dec. 478 (1869).

Wisconsin.—Walsh v. Chicago, M. & St. P. Ry., 42 Wis. 23, 24 Am. Rep. 376 (1877).

[1] One illustration would be "scab" workmen; it seems plain that a carrier could not refuse to accept such a person. See Chicago & A. R. R. v. Ill., 123 Ill. 9 (1827). But see Pounder v. North E. Ry. (1892), 1 Q. B. 385.

§ 247. Refusal to carry because of color or race.

A railroad cannot refuse to carry a person because of his color, or refuse to afford him accommodations such as other passengers enjoy for the same rates.[2] This would be so even if it could be shown by the carrier that his business would suffer if he gave service to the race objected to. On the other hand it is the plain right of the carrier to assign different persons or different races to different accommodations, since the management of the business is left to the carrier. Therefore the legislation in certain States which have provided by statute that separate accommodations may be or shall be furnished by the railroads to colored passengers which are equal to those furnished white passengers is constitutional, as it is due process of law.[3]

§ 248. Refusing distasteful people.

The mere fact that a person is distasteful or has ungentlemanly habits will not justify a carrier in refusing to carry a passenger. This question, or a very similar one, arose in Prendergast v. Compton.[4] The plaintiff, a passenger, sued the defendant, the captain of the ship in which he was being transported, for excluding him from eating in the "cuddy," upon the ground that his conduct was vulgar and offensive. There was evidence that he was in the habit of reaching across other passengers and of taking potatoes and boiled bones in his fingers. The court held, however, for the passenger: "It would be difficult to say, if it rested here, in what degree want of polish

[2] Brown v. Memphis, etc., R. Co., 5 Fed. 499, B. & W. 116 (1880); Chicago, etc., R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641 (1870).

[3] Hall v. Decuir, 95 U. S. 485, 24 L. Ed. 547 (1878); McGuinn v. Forbes, 37 Fed. 639 and note (1889); Houck v. R. R. Co., 38 Fed. 226 (1888); Anderson v. Louisville & N. R. R., 62 Fed. 46 (1894); Crooms v. Schad (Fla.), 40 So. 497 (1905); Chesapeake, etc., R. Co. v. Wells, 85 Tenn. 613, 4 S. W. 5 (1887); Smith v. State, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432 (1898); Council v. Railroad Co., 1 Int. Com. Rep. 339 (1887); Heard v. Railroad Co., 3 Int. Com. Rep. 111 (1889).

[4] 8 C. & P. 454 (1837).

would, in point of law, warrant a captain in excluding a passenger from the cuddy. Conduct unbecoming a gentleman, in the strict sense of the word, might justify him; but in this case there is no imputation of the want of gentlemanly principle."

To the same effect Judge Ellison said, in Eads v. Metropolitan Street Railway:[5] "It is not all conduct which may be said to be outside the pale of good breeding that will bar a passenger from the protection of the law against the carrier for the act of the servant in ejecting him from the car."

On this ground it was held that the fact that boys riding in a car indulged in "skylarking" did not affect their right to be carried.[6]

§ 249. Refusing on moral grounds.

An excellent illustration of this general principle that there can be no refusal on merely personal grounds alone if the application is proper in itself is Brown v. Memphis Railroad. This was a common-law action for the wrongful exclusion of the plaintiff, a colored woman, from the ladies' car of the defendant's train, upon her refusal to take a seat in the smoking-car. At the time of her exclusion the plaintiff held a first-class ticket over the defendant's road from Corinth, Mississippi, to Memphis, Tennessee, and her behavior while in the car was lady-like and inoffensive. The defendant pleaded that the plaintiff was a notorious and public courtesan, addicted to the use of profane language and offensive habits of conduct in public places; that the ladies' car was set apart exclusively for the use of genteel ladies of good character and modest deportment, from which the plaintiff was rightfully excluded because of her bad character.

Hammond, district judge, charged the jury "that the same principles of law were to be applied to women as men in deter-

[5] 43 Mo. App. 536 (1891).

[6] Rosenberg v. Brooklyn H. R. R., 91 Hun, 580, 86 N. Y. Supp. 871 (1904).

[7] 5 Fed. 499 (1880).

mining whether the exclusion was lawful or not; that the social penalties of exclusion of unchaste women from hotels, theatres and other public places could not be imported into the law of common carriers; that they had a right to travel in the streets and on the public highways, and other people who travel must expect to meet them in such places; and, as long as their conduct was unobjectionable while in such places, they could not be excluded. The carrier is bound to carry good, bad and indifferent, and has nothing to do with the morals of his passengers, if their behavior be proper while travelling. Neither can the carrier use the character for chastity of his female passengers as a basis of classification, so that he may put all chaste women, or women who have the reputation of being chaste, into one car, and those known or reputed to be unchaste in another car. Such a regulation would be contrary to public policy, and unreasonable.[8]

[8] See Brown v. Memphis, &c., R. R., 4 Fed. 37 (1880); Rellman Co. v. Bales, 80 Tex. 211, 15 S. W. 785 (1891); Coppin v. Braithwaite, 8 Jur. 875 (1844).

CHAPTER IX.

JUSTIFICATION FOR SUSPENSION OF SERVICE.

§261. Right to suspend service.

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§ 262. Lack of vehicles.
263. Sudden press of business.
264. When usual business is provided for.
265. When expected business is not provided for.

TOPIC B—ORDER OF PREFERENCE IN CARRIAGE.

§ 266. Order of preference as between different classes of goods.
267. Public necessities considered in determining preference.
268. No preference justifiable between goods of same nature.
269. Order of preference between stations.
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271. Order of preference between shippers.
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280. Where no mandatory charter provision.
281. Partial withdrawal permitted.
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§ 261. Right to suspend service.

Another situation which involves the duty to receive which rests upon common carriers is when the carrier is unable or unwilling to handle all the passengers who offer themselves or all the goods which are tendered. In such a case the carrier may claim the right to suspend service, either as to certain classes of traffic or altogether. For instance, by reason of press of business the carrier may declare a "freight embargo" as to certain articles—or in case of a strike the carrier may announce a temporary suspension of business. The question is whether in these and other cases which will be discussed, the carrier is acting contrary to its public duty to the public as a whole, even though the policy is worked out without making personal discriminations against any particular persons. In this chapter, also, more extreme cases are added where the carrier decides for a good reason or for no reason to give up business over a part of its route or to retire from the business altogether.

TOPIC A—PRESS OF BUSINESS.

§ 262. Lack of vehicles.

The carrier is bound to furnish proper vehicles enough to carry on his business, and in the ordinary case he cannot excuse himself for failure to carry passengers or goods on the ground that he has not vehicles enough to transport them.[1] This would be allowing the carrier to urge his own failure in his duty to provide adequate facilities as an excuse.

If cars are needed in which to load car-loads of goods, notice of that fact must be given to the carrier in advance. He cannot be expected to provide empty cars of every sort at each station enough to meet an unexpected demand; but if he is given reas-

[1] Hausley v. Jamesville & W. R. R., 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 551 (1895).

onable notice of the need of such a car he must supply the car.[2] And this is, of course, all the clearer if the carrier expressly agrees to supply the car.[3]

§ 263. Sudden press of business.

The carrier is, however, bound to provide only for such a demand for carriage as he may reasonably foresee; he cannot be required to be able at any time to care for an extraordinary and unexpected demand for carriage. The unexpected demand rendering it impossible after his vehicles are all in use to carry more goods or passengers, will excuse him for refusing to receive additional goods or passengers.[4]

Indeed, he must refuse further applications, or at least give them notice of the emergency, as otherwise he will be responsible for the delay or other injury caused by the sudden press of business.[5]

§ 264. When usual business is provided for.

The duty is relative, not absolute. When adequate provision is made for usual business it can hardly be said that the carrier has not fulfilled his duty. The general principle is well stated in its application to a particular case in a proceeding before the

[2] Chicago & A. R. R. v. Erickson, 91 Ill. 613 (1879); Ayres v. Chicago & N. W. Ry., 71 Wis. 372, 37 N. W. 432, B & W. 223 (1888).

[3] Pittsburgh, C., C. & S. L. Ry. v. Racer, 10 Ind. App. 503, 37 N. E. 280 (1894); Currell v. Hannibal & S. J. R. R., 97 Mo. App. 93, 715 S. W. 113 (1902); McAbsher v. Richmond & D. R. R., 108 N. C. 344, 12 S. E. 892 (1891); Mathis v. Southern Ry., 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824 (1903); International G. N. R. R. v. Young, 28 S. W. 819 (1894).

[4] Dawson v. Chicago & A. R. R., 79 Mo. 296 (1883); Gordon v. Manchester & L. R. R., 52 N. H. 596 (1873); Wibert v. New York & E. R. R., 12 N. Y. 245 (1855); Tierney v. New York C. & H. R. R. R., 76 N. Y. 305, B. & W. 215 (1879); Porcher v. North E. R. R., 14 Rich. Law (S. C.), 181 (1867); Ayres v. Chicago & N. W. Ry., 71 Wis. 372, 37 N. W. 432, B. & W. 223 (1888).

[5] Dawson v. Chicago & A. R. R. (*supra*); Helliwell v. Grand Trunk Ry., 7 Fed. 68 (1881); Ayres v. Chicago & N. W. Ry., *supra*.

Interstate Commerce Commission,[6] where Commissioner Bragg said: "The vast fluctuations and unforeseen developments of commerce, or the fault or misfortune of some one or more connecting lines, may occasionally bring about a condition of affairs in which the best managed railroad, and with the most ample freight equipment, is unable to move at once as promptly as tendered all the freight upon its line, and this without any fault of its own. There is no evidence that the freight equipment of the Pittsburgh & Lake Erie Railroad Company had been unequal to the business of the previous season; and yet in the season the latter part of which is complained of, it appears, in the exercise of good faith and prudent preparation in the line of its duty, to have increased its freight equipment over what it had been in the previous season, and to have kept it well in hand upon its own line for the movement of the freight of that line; and, in addition to this, it had a right to rely, and did rely, upon its arrangements with the Lake Shore & Michigan Southern Railway Company and the New York, Pennsylvania & Ohio Railroad Company for cars. It certainly is the duty of every railroad company to provide itself with a sufficient freight equipment and to keep this well in hand for the prompt movement of freight over its line, based upon known and probable estimates of the business of a season. This the Pittsburgh & Lake Erie Railroad Company seems, from the evidence, to have done; but when an immense volume of local freight was held back by shippers for several months and then precipitated by them upon this carrier, all at once, it could not furnish all the cars thus demanded for the instant movement of this mass of accumulated freight. It did, however, do all in its power to move this freight as quickly as possible. This was no violation of the third section of the Act to Regulate Commerce."

[6] Riddle, Dean & Co. v. Pittsburgh & L. E. Ry., 1 Int. Com. Rep. 689 (1888).

§ 265. When expected business is not provided for.

It would seem to be true also that if the sudden press of business might have been provided against by reasonable diligence of the carrier that there is no such excuse. For example, the carrier should plainly provide more cars upon passenger trains it if is known that by reason of some event more passengers than usual will offer themselves for transportation.[7] And to apply the same rule to the transportation of freight, the carrier performs his public duty by providing for the normal fluctuations in offerings of freight. "The sufficiency of such accommodations must be determined by the amount of freight and the number of passengers ordinarily transported on any given line of road. The duty of a company to the public, in this respect, is not peculiar to any season of the year, or to any particular emergency that may possibly arise in the course of its business. The amount of business ordinarily done by the road is the only proper measure of its obligation to furnish transportation. If by reason of a sudden and unusual demand for stock or produce in the market, or from any other cause, there should be an unexpected influx of business to the road, this obligation will be fully met by shipping such stock or produce in the order and priority of time in which it is offered."[8]

TOPIC B—ORDER OF PREFERENCE IN CARRIAGE.

§ 266. Order of preference as between different classes of goods.

When such an emergency happens, the carrier must prefer certain classes of passengers or freight, and must accept and carry those of a higher class before accepting and carrying those

[7] Chicago & A. Ry. v. Fisher, 31 Ill. App. 36 (1888); Percell v. Richmond & D. R. R., 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 412 and note (1891).

[8] Fagg, J., in Ballentine v. North Mo. R. R., 40 Mo. 491, B. & W. 222 (1886).

of a lower class. In general, it may be said that preference must be given to passengers. Live stock must be preferred to dead freight. And among the classes of dead freight, prishable goods must be accepted and carried before non-perishable goods.[1]

§ 267. Public necessities considered in determining preference.

If, when the line is blocked by freight, the carrier forwards first those goods which are most necessary to the public, it can hardly be said that the carrier is not performing its public duty. Thus is one proceeding before the Interstate Commerce Commission,[2] where complaint was made that there had been unreasonable delay in forwarding hay, the defendant company was exonerated upon a review of the circumstances, Yeomans, commissioner, saying in part: "The anthracite coal strike, for which the defendant railroad companies do not appear to be in any way responsible, necessitated the transportation of bituminous coal from the mines in West Virginia, Maryland and Pennsylvania to eastern points to supply the demand for fuel for industrial and domestic use, and this operated to prevent the shipment of some other classes of freight. Defendants probably had the right to give such freight the preference, and it was not improper that live-stock, perishable freights, and material or supplies for the railroad should be excepted from any embargo imposed. It was also proper that embargo notices should be given such connecting lines, so as to avoid the further congestion of freight in junction freight yards; and in the forwarding of freight received from connecting lines it was proper

[1] Michigan C. R. R. v. Curtis, 80 Ill. 324 (1875); Hewett v. Chicago, B. & Q. Ry., 63 Iowa, 611, 19 N. W. 790 (1884); Dixon v. Chicago, R. I. & P. Ry., 64 Iowa, 531, 21 N. W. 17 (1884); Marshall v. New York C. R. R., 45 Barb. (N. Y.) 502 (1866); Tierney v. New York C. & H. R. R. R., 76 N. Y. 305, B. & W. 215 (1879); McGraw v. Baltimore & O. R. R., 18 W. Va. 361 (1881); Briddon v. Great Northern Ry., 28 L. J. Ex. 51 (Eng. 1858).

[2] S. S. Daish & Sons v. Cleveland, A. & C. Ry., 9 I. C. C. Rep. 513 (1903).

that cars should be forwarded as far as practicable in the order of their receipt, so that there should be no unreasonable discrimination or preference which might be avoided."

§ 268. No preference justifiable between goods of same nature.

It would be a safe generalization, however, that no preference is justifiable between goods of the same nature if the conditions surrounding the movement of the traffic are the same. Thus, in one proceeding before the Interstate Commerce Commission[3] it was alleged that the company was violating the law in giving preference in cars in time of stress to the coke trade over the coal trade. It was held that if this were proved there was illegal discrimination, Commissioner Bragg saying: "Common carriers have no right to withdraw from the transportation of any articles not dangerous to handle and which are ordinarily the subject of transportation by them. Less desirable traffic must be accepted upon reasonable terms as well as that which is more desirable. In this matter as in many others the principles of the Act to Regulate Commerce in prohibiting undue and unreasonable preferences and advantages are simply declaratory of the common law. The common carrier has no right to select either goods or customers. In the present case the commodity in question is one of the chief articles transported upon defendants' lines, and the points between which its movement was desired are points between which general business is solicited; yet the witness testified that his road is not engaged in carrying coal and ore into Cincinnati. His tariff sheet in this respect was better than his practice, for a reasonable rate to Cincinnati on coal was announced in a formal joint tariff to which the Erie road was a party, and when coal was offered for shipment thereunder the party tendering it was as much entitled to have it transported as was any mine-owner or shipper of coal in the

[3] Riddle, Dean & Co. v. Pittsburgh & L. E. Ry., 1 Int. Com. Rep. 689, I. C. C. Rep. 374 (1888).

Pittsburgh region. It was the duty of the carrier to make every reasonable exertion to get it foward without unjustly prejudicing the rights of others in respect to the freight which each contemporaneously tendered. It is not meant by this that the Erie Company was bound to furnish gondola cars for this shipment, but it was bound to make an effort to furnish some sort of cars to move the coal, either gondolas or others. It refused wholly to do anything; it had a large equipment aside from its gondolas; it made no effort to appropriate any other cars to this service or to obtain cars elsewhere."

§ 269. **Order of preference between stations.**

It is obviously impossible to regulate the order of accepting goods according to the time of offers for shipment over the whole line. Reasonable facilities must be provided for each station, and when the space provided for the station has been exhausted no further goods need be received there until it is possible to get more cars without depriving another station of its supply. This matter was discussed in the case of Ballentine v. North Missouri Railroad.[4] In the course of his opinion in that case Mr. Justice Fagg said: "It seems to have been the theory upon which the petition proceeded in this case, that it was the duty of the defendant to have shipped the live stock in the order of time in which it was offered with reference to the entire line of its road, and not to any particular station. This is altogether unreasonable, and in its practical operation would work great hardships upon all companies. Its duty in this respect, then, must be understood in reference to each particular station, and not to the operation of the road as a whole. Whilst it may be difficult to lay down any general rule upon this subject, sufficiently accurate in its terms to cover all cases that may possibly occur, still we think it can be approximated by saying that its means of transportation must be so distributed at the various

[4] 40 Mo. 491, B. & W. 222 (1867).

stations for receiving passengers and freight along the entire line of its road, as to afford a reasonable amount of accommodation for all. Or, to state it differently, no one station should be furnished with means of transportation to the prejudice of another, but a distribution should be made among all in something like a just proportion to the amount of business ordinarily done at each. Its duty is to receive all freight that may be offered, and within a reasonable time, and in the order in which it is offered, to transport the same to any other point on the line of its road that may be designated by the owner or other person having charge of it. This duty to the public must be performed in good faith, and without partiality or favor to any one."

§ 270. No part of the system should be given preference.

All cars available should be used for the equal benefit of the whole system, no part being given preference over another. The question was considered at length in Ayres v. Chicago & Northwestern Railway.[5] In that case Mr. Justice Cassoday said: "Whether the defendant could with such diligence so furnish upon the notice given, was necessarily a question of fact to be determined. The plaintiffs, as such shippers, had the right to command the defendant to furnish such cars. But they had no right to insist upon or expect compliance, except upon giving reasonable notice of the time when they would be required, to be reasonable, such notice must have been sufficient to enable the defendant, with reasonable diligence under the circumstances then existing, to furnish the cars without interfering with previous orders from other shippers at the same station, or jeopardizing its business on other portions of its road. It must be remembered that the defendant has many lines of railroad scattered through several different States. Along each and all of these different lines it has stations of more or less importance. The company owes the same duty to shippers at any one station

[5] 71 Wis. 372, 37 N. W. 432, B. & W. 223 (1888).

as it does to the shippers at any other station of the same business importance. The rights of all shippers applying for such cars under the same circumstances are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along and upon such different lines of railroad, loaded or unloaded. Many will necessarily be at the larger centers of trade. The conditions of the market are not always the same, but are liable to fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines, and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. The requirement of such fair and general distribution and uniform vigilance is not only mutually beneficial to producers, shippers, carriers, and purchasers, but of business and trade generally. It is the extent of such business ordinarily done on a particular line, or at a particular station, which properly measures the carrier's obligation to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance." [6]

§ 271. Order of preference between shippers.

If all shippers cannot be served where there are a certain number of cars apportioned to a given station, the inclination

[6] In Riddle, Dean & Co. v. Pittsburgh & L. E. R. R., 1 Int. Com. Rep. 688, 1 I. C. C. Rep. 374 (1888), it was held improper to assign almost all of the cars to the most profitable divisions of the railroad. And in Hawkins v. Lake Shore & M. S. Ry., 9 I. C. C. Rep. 207 (1902), damages were recovered for not furnishing cars at K. while cars ordered later were supplied at C.

perhaps is to call it discrimination unless they are served in the order of application. But this is not necessarily the rule; indeed, that was not the rule, it will be remembered, by which cars were apportioned to stations. The elements of the general problem are well set forth in a paragraph from the opinion of Commissioner Knapp, in Richmond Elevator Co. v. Pere Marquette Railway Company:[7] "The defendant's rule of car apportionment is that regardless of the number of carloads shippers may have ready for shipment, the first car goes to the shipper who placed the first order, the second to the second order, and so on until each day's supply is exhausted. The mere showing of such a rule and claim that it works discrimination is insufficient. The actual effect of the rule during the time covered by the complaint is necessary to a determination of the question of unfairness in the distribution of cars. The rule of apportioning cars in times of great scarcity by giving the first car to the first shipper ordering and the second to the next shipper ordering, may be entirely just. On the other hand, with a considerable, but still scarce, car supply, and a shipper, like complainant, having a large quantity to ship, while others may have but an occasional carload, rigid adherence to such a rule might prove decidedly unjust."[8]

§ 272. Apportionment of cars to shippers.

The problem of the apportionment of cars to shippers was worked out in the best possible manner in the case of State v. Chicago, Burlington and Quincy Railroad.[9] In that case the

[7] 10 I. C. C. Rep. 629 (1905).

[8] In Galena & C. V. R. R. v. Rae, 18 Ill. 488 (1857), it was held that a railroad might be justified, in press of business ,in taking grain from wagons or boats, while grain in private warehouses was awaiting transportation. And similarly in Choctaw, O. & G. Ry. v. State, 73 Ark. 373, 84 S. W. 502 (1904), it was held that in time of stress the railroad might handle coal cars upon private sidings when it could not furnish facilities for shippers in its own yards which were congested with cars.

[9] 99 N. W. 309 (Neb.), (1904).

plaintiff applied for a writ of mandamus to compel the railroad to furnish him cars for shipping grain. He was in the business of shipping grain in competition with two elevators at the same station, and demanded at least two cars to their three. He was obliged to load grain in the cars from wagons. As Mr. Commissioner Letton said: "The only question, then, necessary for us to decide, is as to whether or not, taking into consideration the volume of Mr. McComb's business, his facilities for loading cars, and all the circumstances, as compared with the volume of business and facilities of loading of each of the elevator owners, he has been unjustly discriminated against by the respondent, and whether it is the respondent's duty to furnish him with two cars for each three furnished to each of the elevators."

The court then found that during the time when there was no scarcity of cars the relator received one-fourth of the number of cars received by both elevators, "and as that was all he wanted it was presumably the measure of the volume of his business, and of his ability to handle grain with his inadequate facilities, as compared with those possessed by the elevators." The court thereupon found him entitled to that proportion of all the facilities which the railroad could furnish in time of stress. "The question is not whether he received all the cars he wanted, but whether the cars on hand were apportioned in fairness and without unjust discrimination among the three grain dealers. It is clear that an individual loading grain into cars by shoveling the same from wagons, other things being equal, has not the ability to load as many cars in a day as a well-equipped elevator; and the testimony in this case clearly shows that the volume of Mr. McComb's business is not such as to require him to be furnished with four cars to every six furnished to both of the elevators in Wilsonville. It further appears that the railroad company prefers to have the grain shipped from elevators, and that Mr. McComb received something less than his fair proportion of cars; but under no view of the evidence that we have been able to take

can we say that he was, at the time this suit was begun, entitled to the number of cars that he asks." [10]

TOPIC C—INTERRUPTION BY STRIKE.

§ 273. Refusal to receive because of strike is not justifiable.

Since the carrier undertakes to carry, and to provide vehicles and servants for that purpose, he is bound to do so; and he is therefore remiss in the performance of his undertaking if for any reason he fails to provide sufficient vehicles properly equipped. The fact that he is prevented from doing so by a strike of his employees is no defence to him. In the earliest case of the sort this seems to have been placed on the ground that, the strikers being the servants of the carrier, he was responsible for their act of refusal to carry.[1]

This, however, is hardly a tenable view, because the strikers are obviously not acting for the master or in the course of business. The true ground of decision is that indicated: that the carrier has undertaken the duty of providing transportation. And this is recognized in the later cases.

The most important case upon this question is probably People v. New York Central Railroad.[2] The facts material in that case are thus summoned up by the court: "For about two weeks, the respondents failed and neglected to receive from three-quarters to seven-eighths of the goods offered for transportation from the city, and large quantities seeking transporation to the city; and in many instances refused to receive goods offered, and turned them back and closed their gates during business

[10] Compare: United States v. Norfolk & W. Ry., 138 Fed. 849 (1905). But see Little Rock & F. S. Ry. v. Oppenheimer, 64 Ark. 271, 43 S. W. 150, 44 L. R. A. 353 (1897). The same problem is involved in Glade Coal v. Baltimore & O. Ry., 10 I. C. C. Rep. 226 (1904). And also see Thompson v. Pennsylvania Ry., 10 I. C. C. Rep. 640 (1905).

[1] Blackstock v. New York & Erie R. R., 20 N. Y. 48, 75 Am. Dec. 372 (1859).

[2] 28 Hun, 543, B. & W. 56 (1885).

hours, thus causing a stoppage of all delivery of freight; and in some instances unusual terms were sought to be imposed as a condition of receiving goods, which would increase the risks of the owner. Great losses were caused thereby, and especially large quantities of perishable goods, by reason of non-delivery, were destroyed, to the value of many thousand dollars, a vast amount of freight, equal, as estimated, to 360,000 tons, was thus detained or refused carriage, and large numbers of carmen were detained in their efforts to deliver freight, the aggregate of which injuries was estimated at some millions.

Mr. Justice Davis said: "Surely, it cannot be doubted that these facts, being true and unexcused, showed a strong case for the interference of the State. The only question is, whether the course and conduct of the respondent was so far excused by anything appearing in the petition and the affidavits that the court below was justified in denying the motion. The most that can be found from the petition and affidavits is that the skilled freight-handlers of the respondents refused to work without an increase of wages to the amount of three cents per hour; that the respondents refused to pay such increase; that the laborers then abandoned the work, and that the respondents did not procure other laborers competent or sufficient in number to do the work, and so the numerous evils complained of fell upon the public, and were continuous until the people felt called upon to step in and seek to remedy them by proceedings for mandamus. These facts reduce the question to this: can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employees over the cost or expense of doing them? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally-expressed consent of the State. The trusts are active, potential, and imperative and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or obstructed without any process recognized by

law. This is something no public officer charged with the same trusts and duties in regard to other public highways can do without subjecting himself to mandamus or indictment."

§ 274. Deficient service not excused by strike.

Lodor v. Brooklyn Heights Railway[3] is even more extreme in its application of those principles. That case was an application for a mandamus to compel the defendant railway to operate its cars. It appeared that most of the employees had quit work after a contention about hours and wages, to which the company would not accede. The company, however, still managed to keep a considerable number of cars running and was gradually getting the men to resume full service. It was therefore urged in behalf of the company that as the management was doing the best it could under all the circumstances, the mandamus applied for should not be issued.

Mr. Justice Gaylor would not accede to this argument. He held: "The duty of the company now before the court is to carry passengers through certain streets of Brooklyn, and to furnish, man and run cars enough to fully accommodate the public. It may not lawfully cease to perform that duty for even one hour. The directors of a private business company may, actuated by private greed or motives of private gain, stop business, and refuse to employ labor at all, unless labor come down to their conditions, however distressing, for such are the existing legal, industrial and social conditions. But the directors of a railroad company may not do the like. They are not merely accountable to stockholders. They are accountable to the public first, and to their stockholders second. They have duties to the public to perform, and they must perform them. If they cannot get labor to perform such duties at what they offer to pay, then they must pay more, and as much as is necessary to get it. For them to do so would be a defiance of law and government which,

[3] 35 N. Y. Supp. 996, 14 Misc. (N. Y.) 208 (1895).

becoming general, would inevitably, by force of example, lead to general disquiet, to the disintegration of the social order, and even to the downfall of government itself." [4]

§ 275. Refusal to receive because of the violence of the strikers or others.

When, however, the carrier has provided sufficient vehicles and servants to carry, and is prevented from proceeding by the violence of a mob over which he has no control, he is excused from receiving goods for transportation. Thus, in an action against a railroad company for not receiving and carrying live-stock, as it had agreed to do, an answer by the company that it had been prevented from so doing by an insurrection or "strike," that attained such proportions that it had finally to be put down by the military power of the State, was held to be sufficient on demurrer. A reply that the strike was caused by a reduction by the company of the wages of its employees was held insufficient, as that could not justify a mob in stopping trains, and delaying the receiving of goods or the transportation of freights, nor could the company be held responsible for the consequences of such unlawful proceedings, when they cause such delay. It was alleged that the insurrection was composed solely of the employees of the company, who had refused to go to work on account of such reduction, and had peaceably assembled to petition to have the former rate restored; and it was therefore urged, in accordance with the reasoning of the earlier cases, that the carrier was responsible for their acts. The court, however, held otherwise, taking the view that the unlawful acts were committed by the company's employees after they had refused to work, and had thus severed their relations with the company, being, therefore, no longer its employees.[5] In Lake Shore and

[4] Compare State v. Great Northern Ry., 14 Mont. 381, 36 Pac. 458 (1894).

[5] Pittsburgh, C. & S. L. R. R. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63 (1878).

Michigan Southern Railway Company v. Bennett,[6] the suit was brought by the shipper against the carrier for damages to live-stock, caused by delay in transportation beyond the regular time. It was shown that a violent strike was in progress throughout the system, and that mobs held up the traffic, delaying the movement of freights. The violence could not be held in check by the public authorities. The violence accompanying the strike might thus be described as the legal cause of the damage.

The court, therefore, held the carrier excused. On petition for rehearing, Hammon, J., said: "There can be no difference practically whether the appellee bases his claim for recovery upon the appellant's liability as a common carrier or upon the express contract set out in the special findings of the court, as, in our opinion, the special findings of fact show that the appellant was not liable upon either ground. The appellee's loss resulted from causes over which the appellant had no control, and against which no care or prudence could have provided; and the special findings show that the appellee's property had all the care and attention that, under the circumstances, an ordinarily careful man would have bestowed upon his own property."[7]

§ 276. How far employees of carrier are bound not to strike.

In the present state of the law, it may be seen that those that conduct a public service are at a disadvantage in dealing with their employees that may well result in extortion. If the law be left that the employers are under a duty to serve, whether the employees will work or not, grave injustice will result. But if the law would go further and enforce some duty upon the employees in the premises, this impartial attitude would preserve

[6] 89 Ind. 457 (1883).

[7] The following cases also hold the railroads excused in case of violent strikes: Indianapolis State R. R. v. Juntgen, 10 Ill. App. 295 (1881); State v. Great Northern Ry., 14 Mont. 381, 36 Pac. 458 (1894); Geismer v. Lake Shore, etc., R. R., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837 (1886); Hall v. Pennsylvania R. R., 14 Phila. 414 (1880).

the equilibrium. And, indeed, it is no more difficult to declare that employees must complete their term of service in a reasonable way than it is to compel the employers to continue to provide adequate service. Nor is it more harsh to apply the coercive processes of the courts to enforce those obligations in one case than in the other. This view of the matter is suggested by Toledo, Ann Arbor and North Michigan Railway v. Pennsylvania Railway.[8] In this case the employees of the Pennsylvania railroad, by reason of a sympathetic strike, ceased to perform their duties, to compel the full performance of which this bill in equity was brought.

The opinion of Judge Ricks in this case is the boldest solution of this vexatious problem: "Holding to that employer, so engaged in this great public undertaking, the relation they did, they owed to him and to the public a higher duty than though their service had been due to a private person. They entered its service with full knowledge of the exacting duties it owed to the public. They knew that if it failed to comply with the laws in any respect severe penalties and losses would follow for such neglect. An implied obligation was therefore assumed by the employees upon accepting service from it under such conditions that they would perform their duties in such manner as to enable it not only to discharge its obligations faithfully, but also to protect it against irreparable losses and injuries and excessive damages by any acts of omission on their part. One of these implied conditions on their behalf was that they would not leave its service or refuse to perform their duties under circumstances when such neglect on their part would imperil lives committed to its care, or the destruction of property involving irreparable loss and injury, or visit upon it severe penalties.[9]

[8] 54 Fed. 746, B. & W. 59 (1894).
[9] See, also, Farmer's L. & T. Co. v. No. Pac. Ry., 62 Fed. 803 (1894).

TOPIC D—WITHDRAWAL FROM THE BUSINESS.

§ 277. Whether there is an obligation to operate whole system.

As an abstract matter the rule as to withdrawal from service would seem to be that unless there was some provision in the charter of the railroad company governing the matter, it might discontinue service over any severable part of its route. But, of course, there may be a charter provision so plain as to prevent such discontinuance. However, the state of the authorities is such that the rules cannot be stated in such simple form without calling attention to cases which seem inconsistent. It will be seen later that there are cases which practically hold that there can be no withdrawal from any part of the route once operated, whether there is any mandatory provision in the charter or not. It is difficult to defend them, for it would seem that just as public service is entered voluntarily, so it may be given up at pleasure; but this view may require modification.

§ 278. Obligation to serve according to charter provision.

If a public service corporation begins operations under a charter obliging it in return for its franchises to render regular service over its whole system at all times, it must be obvious that there can be no escape from this obligation either in whole or in part, without possible forfeiture of its charter. If the charter is less explicit, then those things which it requires by fair implication must be done. This general problem ought to be therefore altogether a question of construction. The charter should be given proper interpretation and that ought to be all there is to the whole question.

The leading case upon this matter seems to be Union Pacific Railway Company v. Hall.[1] It was found by the courts in this case that the beginning of the Union Pacific Railroad was fixed

[1] 91 U. S. 343, 23 L. Ed. 428 (1876).

by the act of Congress on the Iowa bank of the Missouri river, the railway had thrown a bridge across the river, but had later discontinued running through trains upon the Iowa side. The mandamus sought was to compel the company to start from Council Bluffs, Iowa, their regular through freight and passenger trains.

Mr. Justice Strong said in one place: "The contest in this case does not relate to the existence of this duty; it is principally over the question whether the railroad bridge over the Missouri river between Omaha in Nebraska and Council Bluffs in Iowa is a part of the Union Pacific railroad; for if it is there can be no doubt that by its charter the company is required by law to use it in connection with and as a part of their entire road, operating all parts together as a continuous line." [2]

[2] The following cases hold that an explicit charter provision requiring operation of a public system will be enforced by mandamus:

United States.—U. S. v. Union Pacific Co., 160 U. S. 1, 40 L. Ed. 319, 16 Sup. Ct. 190 (1895); Farmers' Loan & Trust Co. v. Henning, 8 Fed. Cas. 4,666 (1878).

Connecticut.—State v. Hartford & New Haven Ry., 29 Conn. 538 (1861).

Illinois.—Chicago & Alton v. Suffern, 129 Ill. 274, 21 N. E. 824 (1889).

Indiana.—Lake Me., etc., Ry. v. State, 139 Ind. 158, 38 N. E. 596 (1894).

Iowa.—State v. Central Iowa Ry. Co., 71 Ia. 410, 32 N. W. 409, 60 Am. Rep. 806 (1887).

Kansas.—City of Potwin Place v. Topeka Railway, 51 Kan. 609, 33 Pac. 309 (1893).

Massachusetts.—Com. v. Hancock Free Bridge, 2 Gray, 58 (1854); Brownell v. Old Colony R. R., 164 Mass. 29, 41 N. E. 107, 29 L. R. A. 169 (1895).

Minnesota.—State v. St. Paul City Railway, 78 Minn. 331, 81 N. W. 200 (1899).

Nebraska.—State v. Sioux City R. R., 7 Neb. 357 (1878).

New Jersey.—Bridgeton v. Bridgeton Traction Co., 62 N. J. L. 592, 43 Atl. 715 (1899).

New York.—People v. The Albany and Vermont Railroad, 24 N. Y. 261, 82 Am. Dec. 295.

England.—R. v. Bristol, etc., Ry., 4 Q. B. 162 (1843).

§ 279. Service must be continued according to charter provisions.

In Re New Brunswick and Canada Railway Company[3] it was an application on behalf of the town of St. Andrews, New Brunswick, for a mandamus against the railway company to compel them to run a train each way each day. It was contended that the liability of the company to perform this duty was established by the act under which the company was incorporated, which required it to run at least one daily train each way over the main line and branches, unless prevented by weather, accident or some other unavoidable cause, other than want of railway stock, or from keeping the road and its appliances in good running order. The company contended that the fact that there was no profit from running a train every day was one of the unavoidable causes which would justify the company in not running a daily train.

Mr. Chief Justice Allen would not admit this contention. "If the fact that this portion of the line does not pay running expenses will justify the company in disobeying the directions of the act in running daily trains, we cannot see what there is to prevent them from abandoning that part of it altogether, and so leaving, as a matter in their discretion, that which the act has imperatively imposed on them as an absolute duty. There is no evidence before us to show whether the running of trains on the whole road is profitable or not; and if this argument could prevail, it certainly would not be sufficient to show that there were no profits derived from that particular portion of the road between St. Andrews and Watt Junction. But admitting that the whole road thus produced no net profits, that does not seem to us sufficient to release the company from the positive duty of running trains enjoined upon them by the act a duty which they undertook voluntarily, for better or worse, which

[3] 1 Pugsley & Burbridge (17 New. Br.), 667.

they have no right to repudiate, if the remedy has not turned out as favorably as they anticipated."[4]

§ 280. **Where no mandatory charter provision.**

At one extreme are a series of decisions which hold that if a public service company under authorization constructs a system it must at all times operate that system. One of the earliest American cases is State v. Hartford & New Haven Railroad.[5] The facts in brief were these: The Hartford and New Haven Railroad Company was chartered to construct and operate a railroad from Hartford to the navigable waters of New Haven harbor. After the construction of the road to the wharves and the use of it in connection with steamboat lines for many years, the defendant entered into an agreement with the New York and New Haven road for a joint line to New York and discontinued running to tide waters any passenger trains. It was ordered that a peremptory mandamus should issue commanding the resumption of this service.

The court—Ellsworth, J., writing the opinion—thought the duty plain: "We hardly know what doubtful principles of law are thought to be involved in this case. The respondents certainly were bound to make their road (if at all) within the time prescribed by their charter; and, having made it, to put it into use—every material part of it—and keep it in use until discharged by the legislature."

The most positive case on the point is State v. Spokane Street Railway.[6] This was an application for a mandamus to

[4] In the following cases loss from operation was urged but held of no avail against an explicit charter provision: Farmers' Loan & Trust Co. v. Henning, 8 Fed. Cas. 4,666 (1878); People v. Colorado Co., 42 Fed. 638 (1890); State v. Central Iowa G. Ry. Co., 71 Iowa, 410, 32 N. W. 409, 60 Am. Rep. 806 (1887); Potwin Place v. Topeka Ry., 51 Kans. 609, 33 Pac. 309 (1893); State v. Sioux City Ry., 7 Neb. 357 (1878); State v. Spokane St. Ry., 19 Wash. 518, 53 Pac. 71, 67 Am. St. Rep. 739, 41 L. R. A. 515 (1898).

[5] 29 Conn. 538 (1861).

[6] 19 Wash. 518, 53 Pac. 720, 67 Am. St. Rep. 739, 41 L. R. A. 515 (1898).

compel the defendant, a street railway company, to operate a line of street railway to Bell Park addition, in the city of Spokane. The Ross Park Street railway built the line in question, under authority by its charter. Later there was a foreclosure upon the property by a trust company on behalf of bondholders, and the trust company leased the property to the defendant company. The defendant company then gave up running cars over the branch line in question. Some people had built residences near it, relying upon it, but only about one hundred people daily had been carried upon the line. The upper court affirmed the order of the court below, granting the mandamus.

Mr. Justice Reaves held the view which follows: "The controversy is whether, under the principles of the common law, a corporation authorized to transact the business which the appellant is authorized to do, and which it has actually transacted, in the acquisition and operation of its street railway line, owes a duty to the public to continue operation. Its franchise was granted to appellant by the State, not for its own profit alone, or that of its stockholders, but in a large measure for the public benefit. Peculiar privileges were conferred upon it in consideration that it would provide facilities for communication and intercourse for the public. It is a common carrier. It was granted the power of eminent domain, a part of the sovereignty of the State, and, with the consent of the municipalities, it may lay its tracks over the public streets and highways. Such corporations, then, may not, by their own acts, disable themselves from performing the functions which were the consideration for the public grant. These rights, then, are held by the grantee, the holder of the franchise, as the agent and trustee for the sovereign power, and are in no sense private, but continue after, as well as before, the grant to be but a portion of the public interests. The absolute commercial and business necessity for permanence when established forbade, from the earliest years, the manifest impolicy of leaving this

interest to the laws of supply and demand, which thus far have sufficiently supplied the community with hotels, mills, etc. And it is not in degree only that these franchises differ from mills and inns. The one is private property; the other is a public function, which originally resided in the government, and, when delegated to either persons or corporations, still retains the public use. Permanency in the service of the public in a reasonable manner is an essential duty in all such avocations.[7]

§ 281. Partial withdrawal permitted where no charter provision.

On the other hand, there are a series of cases just as insistent that, unless there is explicit charter provision requiring complete operation, there may be withdrawal from any portion of the undertaking.

In Commonwealth v. Fitchburg Railroad,[8] it was shown that the railroad at some time after the construction of the Watertown branch had discontinued passenger service over it, after

[7] The following cases granted mandamus to compel operation of abandoned portion of a railroad system:

United States.—Farmers' Loan & Trust Co. v. Henning, 8 Fed. Cas. 4,666 (1878); People v. Colorado Central R. R., 42 Fed. 638 (1890).

Connecticut.—State v. Hartford & N. H. R. R., 29 Conn. 538 (1861).

Kansas.—State v. Potwin Place & T. Ry., 51 Kan. 609, 33 Pac. 309 (1893).

Kentucky.—Board of Trustees v. Chesapeake, O. & S. W. R. R., 94 Ky. 377, 22 S. W. 609 (1893).

Mississippi.—See State v. Mobile, J. & K. C. R. R., 38 So. 732 (1905).

Nebraska.—State v. Sioux City R. R., 7 Neb. 35 (1878).

New Jersey.—Bridgeton v. Bridgeton Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837 (1899).

Pennsylvania.—Erie & N. E. Railroad Co. v. Casey, 26 Pa. St. 287 (1856).

Virginia.—See Southern Ry. v. Franklin Ry., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297 (1899).

Washington.—State ex rel. v. Spokane St. Ry., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515 (1898).

England.—Rex v. Severn R. R., 2 B. & Ald. 646.

See In re Attorney-General, 113 Wis. 623, 88 N. W. 912 (1902).

[8] 12 Gray (Mass.), 180 (1858).

due notice, while continuing freight service. The prayer of the information was *quo warranto* against the corporation to forfeit its franchises. The railroad answered that since the construction of a competing street railway the passengers' receipts had so fallen off that the passenger service had been operated at a loss. The court dismissed the information.

Mr. Justice Thomas discussed the matter after this fashion: "The precise question before us is, whether the running of regular passenger trains was, under the facts admitted by the demurrer, a legal duty? Neither the statutes under which the respondents hold their franchises, nor the general laws regulating railroad companies, in terms impose upon the respondents such duty. If it had been intended that the duty of running trains should be absolute, it would have been made definite. If the duty is to be held absolute, how long, for what period of time, is it to be performed? It is during the lifetime of the charter, and this though the expense of running the train is daily and rapidly using up the capital stock of the company."

It is submitted that the rule laid down in this last case is correct. This does not mean, as some of the cases point out, that there may be cessation of service in respect to some integral part of the system. But it does mean that there may be withdrawal upon proper notice from any separable portion of the business, as was seen in the case just discussed. The alternative is to hold a company in public employment forever bound to carry on, at any loss, whatever service it may at any time have undertaken.[9]

[9] The following cases hold that a public service company may retire from any separable part of the business:

United States.—N. P. Railroad v. Dustin, 142 U. S. 492, 35 L. Ed. 1092 (1891); Royal Trust Co. v. Washburn, etc., R. R., 113 Fed. 531 (1902); Jack v. Williams, 113 Fed. 823 (1902).

Kansas.—See Asher v. Hutchinson W. L. & P. Co., 66 Kan. 496, 71 Pac. 813 (1903).

Massachusetts.—Com. v. Fitchburg R. R. Co., 12 Gray, 180 (1858).

Minnesota.—State v. Southern Minnesota R. R. Co., 18 Minn. 40 (1871).

§ 282. **Whether permanent withdrawal is allowed.**

This seems almost an absurd inquiry, whether permanent withdrawal is allowed, since the result of holding that such withdrawal is impossible, is to hold any one who has ventured into any public calling bound to continue in that public service forever. It would seem upon the face of it that this cannot be the positive rule of law. And yet it will be remembered [10] that many cases hold that even if the charter of a public-service corporation contains no provision requiring complete operation, still there can be no withdrawal from any part of that undertaking, however separable it may be. The logic of such cases would seem to go to the extent of forbidding abandonment of public employment as a whole, as well as in part. But on the other hand, there is a different view of the matter, held by other cases, to the effect that there may be withdrawal from any separable part of the business.[11] These cases plainly would permit complete withdrawal from the business.

§ 283. **Complete abandonment permitted.**

It seems to be the better law, that a public-service company may surrender its charter and give up its whole undertaking if it is insolvent by reason of the hopelessness of the venture. A plain case of this rule is State ex rel. Little v. Dodge City, Montezuma and Trinidad Railway Company.[12] This pro-

Montana.—State v. Helena Power & Light Co., 22 Mont. 391, 56 Pac. 685 (1899).

New York.—People v. Rome, W. & O. R. R. Co., 103 N. Y. 95, 8 N. E. 369 (1886).

Ohio.—Coe v. Columbus R. R., 10 Ohio St. 372.

Texas.—San Antonio Railway v. State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662 (1897).

Virginia.—Sherwood v. Atlantic & Danville R. R., 94 Va. 291, 26 S. E. 943 (1897).

Wisconsin.—Whiting v. Sheboygan Ry., 25 Wis. 167, 3 Am. Rep. 30 (1869).

[10] See § 280, *supra*, and cases cited.

[11] See § 281, *supra*, and cases cited.

[12] 53 Kans. 329, 36 Pac. 755, B. & W. 64 (1894).

ceeding was commenced in this court for the purpose of compelling the Dodge City, Montezuma and Trinidad Railway Company to repair and relay certain portions of the track and roadbed. The railway company was hopelessly insolvent; and it had no rolling stock. Its line of road had not been operated for many months; it could not be operated except at a great loss. The railway company was not able to operate it, and had no funds or property which could be applied to the payment of operating expenses. It seemed to be conclusively shown that all the receipts to be derived from operating the road would not pay the operating expenses, not taking into account the repairs of the road and the taxes.

The chief justice, Horton, took pity upon the miserable plight of this company. "A railway company may be compelled by mandamus to perform the public duties specifically and plainly imposed upon the corporation; and, therefore, we have no doubt of the power of this court, in a proper case, to compel a company to operate its road, and for that purpose to compel the replacement of its track torn up in violation of its charter. But the granting of a writ of mandamus rests somewhat in the discretion of the court. Therefore, the question is, whether the court will compel, or attempt to compel, the railway company, a bankrupt corporation, to relay the track and repair the roadbed. The court will not make a useless or futile order. It will not do a vain thing. The order prayed for should only be issued in the interest of the public. If the track is replaced, there is no reasonable probability that the road will be or can be operated. If a railway will not pay its mere operating expenses, the public has little interest in the operation of the road or in its being kept in repair. If the track were replaced, it would be of no immediate public benefit—possibly of no future benefit—because, if the railway is not operated, the mere existence of a road, not in use, is not beneficial to any one."

CHAPTER X.

RIGHT TO PROTECT ITS OWN INTERESTS.

§ 291. Public duty may conflict with business policy.

TOPIC A — APPLICATION FOR SERVICE BY MEMBERS OF THE PUBLIC.

§ 292. Those who deal with a rival must be served.
293. Carriers must take passengers who come by rival lines.
294. Railroads cannot refuse to take freight from those who deal with a rival.

TOPIC B—APPLICATION BY A RIVAL FOR SERVICE.

§ 295. Competitors have same rights as general public.
296. A competitor cannot be refused as a passenger.
297. Shipments made by a rival must be taken.

TOPIC C—DEMAND BY A RIVAL FOR USE OF FACILITIES.

§ 298. Rivals cannot demand use of facilities.
299. Passenger making use of carrier's facilities in his own business.
300. Carrier not bound to carry packed parcels.

TOPIC D—PROTECTION OF A COLLATERAL BUSINESS.

§ 301. Right to engage in an independent business.
302. Carrier discriminating in favor of itself.
303. Railroad cutting its own rates for itself.
304. Charging its competitors higher relative rates.
305. Whether a collateral business is ultra vires.
306. Whether collateral businesses should be permitted.
307. Arguments for the radical view.

§ 291. Public duty may conflict with business policies.

New conditions seem to us often to create new laws, however much we may be told that nothing more is being done than the

application of existing rules to present circumstances. In the case of the public-service companies the increase in their power has led to such development in the law for their regulation that it is difficult to believe that this law is no more than a necessary deduction from established principles. We have been so used to the many liberties permitted those who carry on a private business, that it has not been seen how fundamentally different are the limitations upon public calling. Those who conduct a private business may adopt such policies as will produce the greatest profits; but those who profess a public employment must not do anything inconsistent with their public duty.

It is proposed in this chapter to consider four aspects of the general problem which has been sketched: (1) May common carriers refuse to serve applicants who persist in having dealings with a rival carrier; (2) or may they refuse to give service to the rival itself if it applies for service as one of the public; (3) or may they deny to a rival the use of their facilities if it wishes them in order to compete against them; (4) or, finally, may they take advantage of their superior position in competing in any capacity with those that they are serving? All of these problems receive a preliminary mention here; and the more important problems are discussed later under the title Discrimination.

TOPIC A — APPLICATION FOR SERVICE BY MEMBERS OF THE PUBLIC.

§ 292. Those who deal with a rival must be served.

First, the case will be considered where the application for service is made by some one of the public, and the service is denied, because the applicant deals with a rival, getting service from him at times. There are gradations here; sometimes there is total refusal to serve any applicant who has dealings with the rival; but more frequently there is some discrimination, more or less onerous, made against those who will not deal exclusively.

Whether a public-service company may do one or the other, to defeat its rival in competition, is the question. This would all be fair enough in competition between private concerns, undoubtedly; but whether the method involved is not so far contrary to public duty as to be forbidden by the law to public service companies is a question.

§ 293. Carriers must take passengers who come by rival lines.

It may be presumed that a public-service company may do nothing to foster its own interests that is inconsistent with its public duty. In the leading case of Bennett v. Dutton,[1] a carrier of passengers sought by putting in force a limitation upon its profession to defeat its rival. Of such importance is this case that the facts are worth full statement. It appeared that there were two rival lines of daily stages running between Lowell and Nashua, that of Tuttle, which ran no farther, and that of French, which formed a continuous mail route from Nashua on with the defendant's line, and that it was further agreed (as Tuttle's line ran no farther than from Lowell to Nashua) by the proprietors of the defendant's line, that they would not receive into their coaches, at Nashua, passengers for places above Nashua, who came up from Lowell to Nashua on the same day, in Tuttle's line, the time of starting from Lowell and arriving at Nashua being the same in both lines. The plaintiff being at Lowell, took passage and was conveyed to Nashua in Tuttle's line; and immediately on his arrival at Nashua applied to be received into the defendant's coach, and tendered the amount of the regular fare. There was room for the plaintiff to be conveyed on to Amherst, but the defendant refused to receive him.

Chief Justice Parker, in this pioneer case, first establishes premise that the defendant is a general carrier of passengers over his route; this he carries to its logical conclusion. "As there

[1] 10 N. H. 481, B. & W. 105 (1839).

was room in the defendant's coach, he could not have objected to take a passenger from Nashua, who applied there, merely because he belonged to some other town. That would furnish no sufficient reason, and no rule or notice to that effect could limit his duty. And there is as little legal reason to justify a refusal to take a passenger from Nashua, merely because he came to that place in a particular conveyance. The defendant might well have desired that passengers at Lowell should take French's line, because it connected with his. But if he had himself been the proprietor of the stages from Lowell to Nashua he could have had no right to refuse to take a passenger from Nashua, merely because he did not see fit to come to that place in his stage. It was not for him to inquire whether the plaintiff came to Nashua from one town or another, or by one conveyance or another. That the plaintiff proposed to travel onward from that place could not injuriously affect the defendant's business; nor was the plaintiff to be punished because he had come to Nashua in a particular manner.

"The defendant had good right, by an agreement with French, to give a preference to the passengers who came in French's stage; and as they were carriers of the mail on the same route, it seems he was bound so to do, without an agreement. If, after they were accommodated, there was still room, he was bound to carry the plaintiff, without inquiring in what line he came to Nashua."

§ 294. Railroads cannot refuse to take freight from those who deal with a rival.

The same law is applicable to carriers of freight. They must take freight of all who tender it properly, regardless of whether the shipper at times employs another carrier to get his goods to market. In one leading case, Chicago and Alton Railroad Company v. Suffern,[2] it appeared that, defendants having connection

[2] 129 Ill. 274, 21 N. E. 824 (1889).

with a switch to plaintiff's mine, disconnected it and refused to supply cars and receive coal from plaintiff, because he allowed another road to connect with the switch. The Illinois courts held that mandamus would issue to compel the connection. It is true that the Constitution[3] provides that all railroad companies shall permit connections to be made with their track, so that any such consignee (of grain) and any public warehouse, coal bank or coal yard, may be reached by the cars on said railroad. And the court relied on this provision, but it seemed also to rest its opinion on the general grounds that a railroad cannot refuse to receive coal over its road because shippers send over another road also. Such a company must carry all freight offered, if legal charges are paid, since fair competition between roads is for public interest; if a road could do so it would establish the most odious sort of monopoly.

TOPIC B—APPLICATION BY A RIVAL FOR SERVICE.

§ 295. Competitors have same rights as general public.

It sometimes happens in the course of competition between two public-service companies that one of them may be bold enough to apply to the other for some service it requires in the conduct of its business. It is obvious that we have a delicate matter here. If the competitor can put himself in such a position that he can be said to apply, as one of the public might, it is difficult to see how his application can be refused. And yet this may aid him in the course of his business in various ways. whatever the situation, it may be premised, certainly, that when a competitor applies for such service as any one of the public might require, that he must be served as any other applicant, no more, no less.

[3] Art. 13, § 5.

§ 296. A competitor cannot be refused as a passenger.

The proposition in the heading is more or less contrary to an early American case, which still is famous, Jenks v. Coleman.[1] This was an action on the case for refusing to take the plaintiff on board of the steamer Benjamin Franklin, as a passenger from Providence to Newport. The facts, as they appeared at the trial, were substantially as follows: That the plaintiff was the agent of the Tremont line of stages, running between Providence and Boston; that his object was to take passage in the boat to Newport, and then go on board the steamboat "President," on her passage from New York to Providence, on the next morning, for the purpose of soliciting passengers for the Tremont line of stages for Boston. This the proprietors of the "President" and "Benjamin Franklin" had prohibited, and had given notice that they would not permit agents of that line of stages to take passage in their boats for that purpose.

Mr. Justice Story virtually directed the jury to find for the defendant. He began his charge to the jury in this manner: "There is no doubt, that this steamboat is a common carrier of passengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question, then, really resolves itself into the mere consideration, whether there was, in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right, but it is subject to such reasonable regulations as the proprietors may prescribe, for the due accommodation of passengers and for the due arrangements of their business. The proprietors have not only this right, but the farther right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit

[1] 2 Sumner, 221, B. & W. 100 (1835).

passengers on board who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful or dissolute or suspicious; and, *a fortiori,* whose characters are unequivocally bad. Nor are they bound to admit passengers on board whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them."

No exception can be taken to the general principles stated in this case which form, undoubtedly, an excellent recapitulation of the general law of public duty governing the situation. The real weakness in the case is the application of this law to the facts in hand. The plaintiff was in fact going from Providence to Newport, without any intention of soliciting passengers going down; although, as the court points out, he might have done so if he had a chance, there was no real likelihood of that. Of course he might have been excluded from the return trip, upon the ground that he was asking for facilities to compete, during the transit, but on the present trip he seems to have been simply a traveller, and must, therefore, be taken, although it might be to the business advantage of the carrier to leave him behind.

§ 297. Shipments made by a rival must be taken.

An analogous case would be if one railroad should make application to another railroad inimical to it to forward some materials to an intersecting point. It is submitted that it is the clear duty of the railroad to which this application is made to accept the shipment, although it might benefit much this road to which the application is made to cripple its rival by refusing to transport the supplies. For this is true of every public-service company that it must accede to every proper application for service, although it might be more profitable to promote its own interests by imposing conditions, or even by refusing altogether.[2]

[2] See Rogers Locomotive & Machine W. v. Erie R. R., 20 N. J. Eq. 379 (1869).

TOPIC C—DEMAND BY A RIVAL FOR USE OF FACILITIES.

§ 298. **Rivals cannot demand use of facilities.**

Although, as has been seen, common carriers, by reason of their public duty, must serve their rivals who ask, as members of the public, those things which members of the public might ask, the rule has its limitations. The principles discussed do not go so far as to give to one common carrier the right to demand the use of the facilities of rival common carriers in order to compete against them. Thus, it seems plain that one railroad cannot require another to give it running rights over its rails, with permission to use its stations even if the applicant is willing to pay a reasonable price for the service. The fundamental reason which permits the railroad to protect itself against such applications is that no member of the public has a right to such privileges.

§ 299. **Passenger making use of carrier's facilities in his own business.**

A passenger has no right to make use of a carrier's facilities to carry on his own business. A leading case on this point is the D. R. Martin.[1] In that case the libellant, Barney, presented himself repeatedly for transportation as a passenger, carrying always a carpet-bag filled with parcels, which he was taking for various owners for compensation. Upon being ejected from the steamboat, he brought this action, claiming that it was the duty of the carrier to transport him and his baggage without any inquiry.

The Circuit Court, overruling the holding below, found for the ship. Mr. Justice Hunt said, in part: "The steamboat company owning this vessel were common carriers between Huntington and New York. They were bound to transport every passenger presenting himself for transportation, who was in a fit condition to travel by such conveyance. They were bound, also, to carry all freight presented to them in a reason-

[1] 11 Blatch. (U. S.) 233, Fed. Cas. 1,030, B. & W. 114 (1873).

able time before their hours of starting. The capacity of their accommodation was the only limit to their obligation. A public conveyance of this character is not, however, intended as a place for the transaction of the business of the passengers. The suitable carriage of persons or property is the only duty of the common carrier. A steamboat company, or a railroad company, is not bound to furnish travelling conveniences for those who wish to engage, on their vehicles, in the business of boot-blacking, or of peddling books and papers. This individual is under their control, subject to their regulation, and the business interferes in no respect with the orderly management of the vehicle. But if every one that thinks fit can enter upon the performance of these duties, the control of the vehicle and its good management would soon be at an end." [2]

§ 300. Carrier not bound to carry packed parcels.

Another excellent illustration of this rule is Johnson v. Dominion Express Company.[3] Defendant in this action was a general express company, while plaintiff was an association, trading under the name of the National Package Express Company, engaged in forwarding small parcels. This action was brought to compel the defendant to accept from the plaintiffs, at the regular schedule rates for large packages, cases containing small parcels, which the plaintiff had collected for transportation from various shippers, to be delivered by them later to various consignees. The court held that the refusal was justifiable.

Extracts from the opinion of Mr. Justice Rose follow: "That a number of persons should combine to carry on a business in competition with the defendant, to take from it the most profitable part of its business; to make use of its capital and facilities for its destruction, cannot be assumed to have been considered or provided for by the company in fixing its present tariff. Nor

[2] The law is all the same way; see, also, Barney v. Oyster Bay & H. S. B. Co., 67 N. Y. 301 (1826).

[3] 28 Ont. Rep. 203 (1890).

do I think that the plaintiffs or any of the public could for a moment fairly argue or assert that they believed, or were led to believe, that the defendant company professed to carry such packed parcels, or was an association doing business in such a manner. I find as a fact that the rates tendered by the plaintiffs, or which they were willing to pay, were not reasonable under the circumstances. I do not find it necessary to determine whether or not the defendant has the right absolutely to decline to carry parcels so packed for the plaintiffs, but I say I do not think the defendant ever intended to hold itself out to the public as the carrier of the goods of a rival express company, making use of its capital and its facilities for doing business to the aggrandisement of its rival and its own destruction." [4]

TOPIC D—PROTECTION OF A COLLATERAL BUSINESS.

§ 301. Limitations upon the right to engage in an independent business.

Those who are engaged in private business may conduct another business if they please, and plainly they may put in force policies to foster that business, many of which it is certain that those who conduct a public business may not employ. The open recognition of this law limiting the rights of one engaged in a public employment if he enters into competition with members of the public in various businesses in which his services are requisite, constitutes the latest development in this rapid growth

[4] Compare Chambers v. Pennsylvania R. R., 4 Brewst. (Pa.) 563. But see Davies v. Pere Marquette Ry., 10 I. C. C. Rep. 405 (1905).

The view of the English cases seems to be that if a railway carries packed parcels for forwarders generally it cannot refuse a particular applicant. Crouch v. London & N. W. Ry., 14 C. B. 255 (1854); Baxendale v. So. West. Ry., 35 L. J. Exch. 108 (1866).

In Buckeye Buggy Co. v. Cleveland, C., C. & St. L. Ry., et al., 9 I. C. C. Rep. 620 (1903), it is decided that where the consignee is owner of goods it makes no difference if car loads are made up of shipments from various vendors; the question whether a carrier could prevent a forwarder from making up a car load for various customers was left undecided.

of the law governing public calling. The question has as yet come before the courts for adjudication only a few times; but even the most conservative courts recognize the necessity of regulation here, while the radical courts are willing in certain instances to go to the extent of prohibition.

Indeed, it is feared by many people, who are examining into the dangers affecting modern commerce from these new conditions, that unless those in common calling are held to the strictest accountability in the performance of their public duties the competitive system with its market open to all is in the gravest peril. And the situation would become intolerable if those who control the destinies of trade through their ownership of the public utilities should be permitted to concentrate in their own hands the principal private businesses, which they might not inconceivably do if they were permitted to enter into general business and make use of their superior position to crush their competitors.

§ 302. Carrier discriminating in favor of itself.

In an important case before the Interstate Commerce Commission—Grain Rates of Chicago Great Western Railway[1]—the decision was that the defendant carrier could not purchase grain, even for the purpose of securing the right to transport it, if that involved the evasion of the law which would have applied to it had it been owned by any other party. It was proved at the hearing in this case that the Chicago Great Western Railway Company owning the entire stock of the Iowa Development Company, which had been organized for the purpose of holding the title to certain lands of the railway company, caused grain to be purchased in Kansas City in the name of the development company, transported over the lines of the railway company, to Chicago, and there sold upon the market. The development company had no bona fide interest in the transaction. Neither the railway company nor the development company purchased the grain for the purpose of ownership, the whole transaction being

1 7 I. C. C. Rep. 33 (1897).

simply a device to secure its transportation at other than the published rate; and the only rate paid was the profit upon the transaction, which varied with each shipment.

In the course of its decision the commission said, "Suppose that the development company be entirely eliminated from the consideration, and that the transaction be treated, as it in fact was, as the transaction of the railway company. In that case the railway company owned the grain, transported it for itself, and received for its compensation the difference in price between what was paid and what it sold for, less the commissions. There was no fixed rate. The rate varied with each individual shipment. The rate actually received was much less than was or would have been charged any other person for the same service under the same conditions. Clearly, therefore, the transaction was both a violation of the sixth section and an unjust discrimination under the second and third sections, unless the railway company, by virtue of the fact that it owned the merchandise transported, was relieved from the operation of the act. We hold that it was not. Granting that the railway company had the legal right under its charter to buy and sell this corn in this manner, still it must own it and transport it subject to the same limitations as every other individual. In its capacity of owner it was a private person, in its capacity of carrier it was a public servant. If it elected to become a private individual in respect of the ownership of this grain, it could extend to itself in its capacity as a public servant no other or different privileges than it extended to every other shipper. To hold that this respondent might become a shipper on its own account for the express purpose of avoiding the act to regulate commerce would be to nulify that act in many essential respects."

§ 303. Railroad cutting its own rates for itself.

This development which is going on in the law was brought to the attention of all not long ago by a striking decision handed down by the United States Supreme Court in regard to the coal

roads—New York, New Haven & Hartford R. R. v. Interstate Commerce Commission.[2] The complaint in that case was filed by the attorney-general under the provisions of the Interstate Commerce Act, which forbid personal discrimination, charging that traffic was being moved at less than the published rates. It was shown that the Chesapeake and Ohio Railroad had sold to the New York, New Haven and Hartford Railroad sixty thousand tons of coal to be delivered to the buyer at $2.75 per ton; and it was averred that the price of the coal at the mines where the Chesapeake and Ohio bought it and the cost of transportation from Newport News to Connecticut would aggregate $2.47 per ton, thus leaving to the Chesapeake and Ohio only about twenty-eight cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was $1.45 per ton. Upon these facts the United States Supreme Court decided that there was in effect the evil of personal discrimination against other shippers in this arrangement; and the final decree, therefore, was that the Chesapeake and Ohio was perpetually enjoined from taking less than its published tariff of freight rates, by means of dealing in the purchase and sale of coal.

Mr. Justice White, who wrote the opinion of the court, puts the matter well when he says: "If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all. Now if by the mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus

[2] 200 U. S. 361, 26 Sup. Ct. 272 (1906).

giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may by becoming a dealer buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier. And as by the departure from the tariff rates the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person so selected by the carrier would have a monopoly in the market to which the goods were transported."

It was a fact shown in the record of this case that the Chesapeake and Ohio, as a result of its being a dealer in coal as well as a carrier, had become virtually the sole purchaser and seller of all coal produced along its line of road. As the court points out, the inevitable tendency will be toward such monopoly if the common carrier is permitted both to deal in a commodity and to carry it. The court is content, it seems, to decide no more at present than that the carrier must charge itself in its operations as a dealer with its own schedule rates as carrier; but much of its reasoning, if carried to the logical conclusion, would forbid the railroads to take the inconsistent positions of dealers and carriers.

§ 304. **Charging its competitors higher relative rates.**

The view expressed in the last opinion that a carrier in engaging in ordinary business must treat itself and its business rivals with equality is a conservative view. It may be that a more radical remedy is demanded to meet the situation, for it is not always safe to leave the matter in this shape. Thus in another case before the commission,—McGrew v. Missouri Pacific Railway[3]—the defendant railway which owned many coal mines along its route, was shown to charge higher relative rates to its competitors in the coal mining business whose product was of a higher grade.

The commission pointed out that this could not be altogether stopped as the law stood, saying: "It may properly be observed that in a case like that under consideration it is difficult to afford the complainant adequate relief. The defendant railway company owns most of the mines upon its system. It both mines the coal and transports it to market. It is a matter of entire indifference to it whether a profit accrues from the mining or from the transportation. It may so adjust its rates that the mining of its coal will be conducted at a loss, the profit being derived from the carriage, and in such event every coal operator upon its line paying those rates must do business at a loss. The only remedy available in such case to the independent operator is to secure to him a reasonable rate."

It cannot be insisted upon too strongly that the paramount duty of the common carrier is to the public. It must do nothing inconsistent with that obligation. To carry its own goods at lower rates than it carries those of the shipping public will enable it to market those goods at lower prices than other shippers can make. And this, it is submitted, is in substance discrimination, or at all events has all the effects of discrimination. Moreover, to a certain extent these evils are practically unavoidable from the nature of the case whenever a common carrier is also a dealer in the commodities it carries.

[3] 8 I. C. C. Rep. 630 (1901).

§ 305. Whether a collateral business is ultra vires.

Because of general policy if for no other reason it should always be held ultra vires for a public-service corporation to engage in any collateral business outside of its direct duties to the public in the same line of service that it is conducting. This was said in an English case at an early date, Attorney-General v. Great Northern Railway.[4] There the question was whether a railroad was engaged beyond its powers in actively buying coal from collieries along its route which it transported to market in competition with other coal of private shippers.

In holding that it was Vice Chancellor Kinderley said, adverting to the policy of the matter: "There is no reason, as the affidavits show, why they should not—there is great danger that they may—get into their hands the entire business in the coal of all that district of the country. If they can do that in regard to coal, what is to prevent their doing it with every species of agricultural produce all along their line? Why should they not become purchasers of corn, of all kinds of beasts and sheep, and every species of agricultural produce and become great dealers in the supply of edibles to the markets of London; and why not every other species of commodity that is produced in every part of the country from which or to which their railway runs? I do not know where it is to stop, if the argument on the part of the company is to prevail. There is, therefore, great detriment to the interests of the public, for this reason, taking merely the article of coal."

But even granting that the public service company has some permissive clauses in its charter which might include the power to engage in some independent business, the problem is not to be dismissed. Natural persons engaging in a public employment have apparent power to engage in any collateral businesses that they please, and yet the law governing the conduct of a public business has certainly developed so far that they cannot

[4] 29 L. J. Ch. 794 (1859).

discriminate in their own favor, and as will be seen in the next section the law may have gone so far as to forbid them from engaging in a collateral business in competition with the people they are serving. It is submitted that a corporation, whatever its prima facie powers, ought not to stand in any different position before the law from a natural person.[5]

§ 306. Whether collateral businesses should be permitted.

Some courts seem disposed to go one step further yet and to say that it may be inconsistent with public service for the public servant to engage at all in the ouside business and to make use of his own facilities in conducting it. A square decision in point is Central Elevator Co. et al. v. People.[6]

The informations made the same general allegations in each case,—that defendants had stored grain owned by themselves in the particular warehouse of which they were proprietors; that not less than three-fourths of all the grain received in the public warehouses in Chicago was owned by the warehousemen; that the grades for inspection of grain were such that the grain of each grade was not of the same quality, but that separate carloads of different quality and value were graded in the same grade; that by reason of advantages of the defendants, as owners of warehouses, in mixing and manipulating grain, and rebating storage charges, and otherwise, they had been enabled to drive out competition, and to hold and enjoy the privilege of buying grain free from competition; and that such storing of grain was unlawful and injurious to the public. All the informations prayed for the same relief,—a perpetual injunction to restrain defendants, as warehousemen, from storing grain in their own warehouses.

The court granted the application. Cartwright, the justice who wrote the opinion, said in part: "The public warehouses established under the law are public agencies, and the defend-

[5] As the matters discussed in this section are questions of general corporation law, it is not thought necessary to subjoin any citations.

[6] 174 Ill. 203, 51 N. E. 254 (1898).

ants, as licensees, pursue a public employment. They are clothed with a duty towards the public. The evidence shows that defendants, as public warehousemen storing grain in their own warehouses, are enabled to, and do, overbid legitimate grain dealers, by exacting from them the established rate for storage, while they give up a part of the storage charges when they buy or sell for themselves. By this practice of buying and selling through their own elevators the position of equality between them and the public whom they are bound to serve is destroyed, and by the advantage of their position they are enabled to crush out, and have nearly crushed out, competition in the largest grain market of the world. The result is that the warehousemen own three-fourths of all the grain stored in the public warehouses of Chicago, and upon some of the railroads the only buyers of grain are the warehousemen on that line. Where the warehouseman is a buyer, the manipulation of the grain may result in personal advantage to him. Not only is this so, but the warehouse proprietors often overbid other dealers as much as a quarter of a cent a bushel, and immediately resell the same to a private buyer at a quarter of a cent less than they paid, exacting storage, which more than balances their loss. In this way they use their business as warehousemen to drive out competition with them as buyers. It would be idle to expect a warehouseman to perform his duty to the public as an impartial holder of the grain of the different proprietors, if he is permitted to occupy a position where his self-interest is at variance with his duty. In exercising the public employment for which he is licensed, he cannot be permitted to use the advantage of his position to crush out competition and to combine in establishing a monopoly, by which a great accumulation of grain is, in the hands of the warehousemen, liable to be suddenly thrown upon the market whenever they, as speculators, see profit in such course." [7]

[7] Accord, Hannah v. People, 198 Ill. 77, 64 N. E. 776 (1902), a more extreme case, holding an act passed to enable the warehousemen to do what

§ 307. Argument for the radical view.

This at least may be regarded as conceded, that a public service company if engaged in private business for itself dependent upon the service it conducts ought not to prefer itself to its competitors in business among the general public who have already made application for service. But a position has already been taken far beyond this proposition; it is now urged that those who are undertaking a public service ought not to be allowed to engage in private business in competition with those whom they are professing to serve unless matters may be so arranged that the competition shall be upon equal terms. And it may very probably turn out that it will be found necessary for the maintenance of the highest type of public service to forbid those who undertake such callings from engaging at all in business of their own where their interests might come in conflict with the interests of those whom they are serving.

The case bears some analogy to that of the trustee whose duty forbids him from entering, for his own benefit, into transactions inconsistent with his duty to his *cestui*. Surely if the railroads should engage in manufacturing, in agriculture, in dealing in groceries, or in selling meats, there would be a great public outcry that the individual could not compete against them with any hope of success. Even if in the face of the temptation to prefer themselves an upright railroad management should treat its business department upon the same basis as its competitors, the fact would remain that all in all the railroad could afford to conduct its own transportation of its own goods at a lower margin of profit than it could handle others. If a railroad could not get two profits, one from trading and one from transporting, it would inevitably turn out that it would content itself with one from the whole transaction.

was prohibited in this decision, unconstitutional because against the clauses declaring warehouses public. In re Transportation of Fruit, 10 I. C. C. Rep. p. 377 (1905), hostility was shown against the practice of the refrigerator car lines in dealing in the commodities which they transport.

The present tendency therefore places the public service companies definitely in the position of conditions of commerce, free to all to use in their competition with one another. But from that competition the public service companies themselves ought to stand aloof, lest their entrance into the field disturb that equality which all may demand as of right. It would be too much to assert that this is established law as yet. However, it is not impossible to demonstrate that this ultimate rule is the logical consequence of the law establishing that public duty which requires of all who undertake any public employment the utmost public service.

BOOK II.

REGULATION OF RAILROAD RATES IN ACCORDANCE WITH COMMON LAW PRINCIPLES.

PART I.

Limitation of Charges.

CHAPTER XI.

GENERAL PRINCIPLES GOVERNING COMPENSATION.

§ 311. General principles governing reasonableness of rates.

TOPIC A—THE SCHEDULE TAKEN AS A WHOLE.

§ 312. Reasonableness of the schedule as a whole.
313. Tests of the reasonableness of a schedule.
314. Many elements to be taken into account.
315. Interests of the companies to be considered.
316. Interests of the public to be considered.
317. Accommodation of the interests of both sought.
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TOPIC B—THE PARTICULAR RATES CONSIDERED SEPARATELY.

§ 319. Reasonableness of the separate rate.
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324. Possibility of increase of business if rates are lowered.
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§ 311. General principles governing reasonableness of rates.

The question of the reasonableness of rates is a complex one. As there are two parties having an interest in the rates, the carrier and the shipper, and their interests are diverse and, to

a considerable extent, opposed, a rate which is reasonable from the point of view of one may be quite unreasonable from the point of view of the other. It will be noticed that the interest of the carrier is entirely directed toward framing a schedule of rates which as a whole shall produce a certain return, and so long as the return is realized it is immaterial to him what the proportion of contribution of each individual shipper is to the whole amount. On the other hand, the shipper is interested in the individual rate charged to him, and in that alone. So long as his rate is a fair one it is immaterial to him that the whole schedule is so arranged as to yield a great profit to the carrier.

The reasonableness of the schedule as a whole therefore especially concerns the carrier, that of the separate rate especially concerns the shipper. In order to be entirely reasonable the schedule must as a whole be fair to the carrier, and in detail to each shipper. Here, however, the opposing interests of the carrier and the shipper present a serious difficulty in the working out of the problem of rates. A carrier may be so happily situated as to be able to frame a schedule which will be fair to himself and at the same time just to the individual shippers. This, however, is quite likely not to be the case. A schedule may not be possible which will yield fair compensation to the carrier without at the same time exacting an unjust amount from some particular shipper.

When this is the case it is necessary in framing a schedule to require a proper amount of concession from all parties concerned. The principles on which the fairness of the whole schedule would be determined will be limited by the requirement of fairness to the individual shippers; and on the other hand the principles on which the reasonabless of a particular rate would be determined may need modification because of the just claim of the carrier to a fair compensation. The examination of the reasonableness of the carrier's rates may therefore involve a study both of the reasonableness of the schedule as a whole and also of the reasonableness of the separate rates.

TOPIC A—THE SCHEDULE TAKEN AS A WHOLE.

§ 312. Reasonableness of the schedule as a whole.

The reasonableness of the schedule as a whole depends as has been seen, upon whether it yields a fair return to the carrier. This is largely a mathematical question. The carrier is entitled, first, to pay all expenses; which would include both the actual expenses of operation and also certain annual charges that must be paid before any real profit can be realized. He is entitled furthermore to gain a fair profit on his capital invested. The determination of the actual amount of the capital invested may be a matter of some difficulty; once determined, the rate of profit upon that amount of capital is a question which will be determined, generally speaking, by the ordinary business profit of the time and place. A schedule of rates will be reasonable from the point of view of the carrier if it yields him a net profit equal to that which would be realized, as a business question, from any other business where the capital and the risk were the same.[1]

[1] It may be said to be now well established that in most cases a public service company is entitled to earn a reasonable return from its schedule as a whole sufficient to produce a fair profit upon a proper capitalization. The more prominent of the recent cases that hold this view, are cited in the list which follows if the discussion is particularly worth while:

UNITED STATES SUPREME COURT:

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1893), reversing in part and affirming in part 51 Fed. 529; St. Louis & S. F. Ry. Co. v. Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484, affirming s. c. 54 Ark. 101, 15 S. W. 18 (1895); Covington and Lexington T. R. Co. v. Sanford, 164 U. S. 596, 41 L. Ed. 561, 17 Sup. Ct. 198 (1896), reversing s. c. 20 S. W. 1031; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; Cotting v. Kansas City S. Y. Co., 183 U. S. 79, 46 L. Ed., 22 Sup. Ct. 30, B. & W. 316 (1901), reversing 82 Fed. 850 (1897); State v. Minneapolis St. Ry., 186 U. S. 257, 193 U. S. 53, affirming 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514; San Diego T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming 110 Fed. 702; Stainslaus Co. v. San Joaquin Can. & Ir. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 241 (1903), reversing s. c. 113 Fed. 930.

§ 313. **Tests of the reasonableness of a schedule.**

As a general rule therefore it will be unjustifiable for the government to reduce the total net returns from the schedule as a whole below what will produce a fair return upon a proper capitalization. A general statement as this leaves much undefined; but it is not altogether impossible to apply it to particular conditions. As an illustration of the actual way in which the problem is handled an extract is made from one of modern cases which are establishing a practicable method of dealing with this intricate problem. In passing upon the constitutionality of the reduction of rates ordered by a State Commission in Matthews v. Board of Corporation Commissioners [2] Judge Simonton said:

FEDERAL COURTS:

Memphis Gas Light Co. v. New Memphis, 72 Fed. 952 (1896); Southern Pac. Ry. v. Railroad Commissioners, 78 Fed. 236 (1896); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Missouri Pac. Ry. v. Keyes, 91 Fed. 47 (1898); Louisville & N. Ry. v. McChord, 103 Fed. 216 (1900); Mathews v. Board of Corp. Com., 106 Fed. 7 (1901); Haverhill Gaslight Co. v. Barker, 109 Fed. 694 (1901); Interstate Com. Com. v. Louisville & N. R. R., 118 Fed. 613 (1902); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903); Palatka Water Works v. Palatka, 127 Fed. 161 (1903).

STATE COURTS:

California—Spring Valley W. v. San Francisco, 82 Cal. 286, 22 Pac. 910 (1890).

Florida—State v. Seaboard Air Line (Fla.), 37 So. 658 (1904).

Illinois—Chicago v. Rogers Pk. Co., 214 Ill. 212, 73 N. E. 375 (1905).

Iowa—Cedar Rapids Co. v. Cedar Rapids, 118 Ia. 230, 91 N. W. 1081 (1902).

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

Minnesota—State ex rel. v. Minneapolis & St. Louis R. R., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514 (1900).

Mississippi—Alabama Ry. v. Railroad Commissioners (Miss.), 38 So. 356 (1905).

Nebraska—State v. Sioux City, etc. R. R., 46 Neb. 682, 65 N. W. 766 (1896).

Pennsylvania—Brymer v. Butler Water Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260 (1897).

[2] 106 Fed. 7 (1901).

"The questions made in this case are federal questions and grow out of the fourteenth amendment. If the rates fixed are unreasonable, that is to say, if they compel the railway company to conduct its operations at a loss or without a fair remuneration for its investment,—then the property of the company is taken and used by the public without just compensation, and it is deprived of its property without due process of law. The jurisdiction of this court depends on the federal question. It is its duty, as it is the duty of all courts, state and federal, to see to it that no right secured by the supreme law of the land is impaired by legislation acting directly on the subject, or through agents created by legislation. The law applicable to this case has been settled by a series of decisions of the Supreme Court of the United States. On the other hand, the public cannot require the corporation to use its plant, its money, and its credit without remuneration.[3]

" The best interests of the public forbid this. Railroads are the arteries of trade. Through them flows the life blood of a community. The best statesmanship contributes to their maintenance and encourages their prosperity. What the remuneration shall be depends upon the circumstances of each case. Investments may be made in railroads, as in any species of property, so unwise as never to be remunerative. As was said in Covington Turnpike case, *supra,* " It cannot be said that a corporation is entitled as of right, and without reference to the interests of the public, to realize a given per cent. on its capital stock." *A fortiori,* a corporation cannot be entitled to compel the public to make profitable an investment which was unwisely inaugurated and badly executed. The basis of all calculations as to the reasonableness of rates is the fair value of the prop-

[3] Citing Smyth v. Ames, 169 U. S. 467, 18 Sup. Ct. 418, 42 L. Ed. 819; Turnpike Co. v. Sandford, 164 U. S. 578, 18 Sup. Ct. 198, 41 L. Ed. 560; Chicago, M. & St. P. Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; Railway Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858.

erty used for the convenience of the public,—not its cost, nor the amount of money expended for it, but its value as a producing factor, taking into consideration its location, character of the country through which it passes, and the reasonable expectation of business coming to it. The railroad company is entitled to a fair return upon the value of the property, ascertained in this way, and is not entitled to exact from the public more than this. To this question, so difficult in its solution, and so often, after the best effort, unsatisfactory in its result, the special master devoted much consideration." [4]

[4] Substantially the same view as that expressed in the case quoted is held in the following cases, among others:

UNITED STATES SUPREME COURT:

Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming s. c. 64 Fed. 165; Lake Shore & Mich. So. Ry. v. Smith, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. 565 (1889), reversing 114 Mich. 460, 72 N. W. 328; San Diego Land & Town Co. v. Nat. City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; Chicago, M. & St. P. Ry. v. Thompkins, 176 U. S. 167, 44 L. Ed. 418, 20 Sup. Ct. 336 (1900), affirming s. c. 90 Fed. 363; San Diego T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 511 (1903), affirming s. c. 110 Fed. 702; Stanislaus Co. v. San Joaquin Can. & Ir. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 241 (1903), reversing s. c. 113 Fed. 930.

FEDERAL COURTS:

Southern Pacific Ry. v. Railroad Commissioners, 78 Fed. 236, B. & W. 322 (1896); Interstate Com. Com. v. Louisville & N. R. R., 118 Fed. 613 (1902); Spring Valley Water Wks. v. San Francisco, 124 Fed. 574 (1903); Tift v. Southern Ry. Co., 138 Fed. 753 (1905).

STATE COURTS:

Florida—State v. Seaboard Air Line (Fla.), 37 So. 658 (1904).

Iowa—Cedar Rapids Co. v. Cedar Rapids, 118 Ia. 234, 91 N. W. 1081 (1902).

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

Nebraska—State v. Sioux City, etc., R. R., 46 Neb. 682, 65 N. W. 766 (1896).

§ 314. Many elements to be taken into account.

That these various elements are all taken into consideration by a modern court in passing upon the reasonableness of a schedule of rates may be shown by extracts from some leading cases. For example in the case of Brymer v. Butler Water Company,[5] the court being called upon under a statute to pass upon the complain that the schedule of rates of the water company was too high, Mr. Justice Williams said: "We do not think this supervisory power would justify the court in preparing a tariff of water rents and commanding a corporation to furnish water to the public at the rates so fixed. This would involve a transfer of the management of the property, and the business of a solvent corporation, from its owners to a court of equity, for no other reason than that the court regarded some one or more of the charges made by the company as too high. The Act of 1874 contemplates no such radical departure from established rules as this, but provides simply for the protection of the citizen from extortionate charges specifically pointed out and complained of by petition. This leads us to the second question raised, viz.: by what rule is the court to determine what is reasonable, and what is oppressive? Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable." [6]

[5] 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897).

[6] These various elements are discussed in the following cases, although few cases are so exhaustive as the case quoted in the text.

§ 315. Interests of the companies to be considered.

However desirable it may be to provide lower rates for the public that is receiving the service, it is equally necessary to leave a reasonable return to the company that is performing the service. In some cases where a rate has been fixed by the state the court when it is called upon to pass upon it may find that both interests are sufficiently protected; but in others it may be found that the constitutional rights of the company have been ignored in the desire to grant a lower rate to the public. The court found this in Metropolitan Trust Company v. Houston & Texas Central Railway,[7] and held the rates fixed by the Texas commission for the railroad in question unconstitutional. Judge McCormick said: "As popularly expressed, the rights of the people—the rights of shippers who use it as a carrier—have to be regarded; but, as judicially expressed, these last have to be so regarded as not to

UNITED STATES SUPREME COURT:

Covington and Lexington T. R. Co. v. Sanford, 164 U. S. 596, 41 L. Ed. 561, 17 Sup. Ct. 198 (1896), reversing s. c. 20 S. W. 1031; Smythe v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming 64 Fed. 165; San Diego Land & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming 74 Fed. 79.

FEDERAL COURTS:

Chicago & N. W. R. R. v. Dey, 35 Fed. 866, 1 L. R. A. 744 (1888); Chicago, W. P. M. & O. v. Becker, 35 Fed. 883 (1888); Southern Pac. Ry. v. Railroad Commissioners, 78 Fed. 236, B. & W. 322 (1896); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683 (1891); Missouri Pac. Ry. v. Keyes, 91 Fed. 47 (1898); Kimball v. Cedar Rapids, 99 Fed. 130 (1900); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903); Palatka Water Works v. Palatka, 127 Fed. 161 (1903).

STATE COURTS:

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902); Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

Pennsylvania—Brymer v. Butler Water Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897); Wilkes-Barre v. Spring Brook Water Co., 4 Lack. Leg. News (Pa.), 367 (1879).

[7] 90 Fed. 683, B. & W. 342 (1898).

disregard the inherent and reasonable rights of the projectors, proprietors, and operators of these carriers. It is settled that a state has the right, within the limitation of the constitution, to regulate fares. From the earliest times public carriers have been subject to similar regulations through general law administered by the courts, requiring that the rates for carriage should be reasonable, having regard to the cost to the carrier of the service, the value of the service to the shipper, and the rate at which such carriage is performed by other like carriers of similar commodities under substantially similar conditions. But neither at common law nor under the railroad commission law of Texas can the courts or the commission compel the carriers to submit to such a system of rates and charges as will so reduce the earnings below what reasonable rates would produce as to destroy the property of the carrier, or appropriate it to the benefit of the public. The cost of the service in carrying any one particular shipment may be difficult to determine, but the cost to the carrier of receiving, transporting, and delivering the whole volume of tonnage and number of passengers in a given period of time must include, as one of its substantial elements, interest on the value of the property used in the service." [8]

[8] It is generally agreed that the companies should be protected against the virtual confiscation which results from reducing their rates by legislation below a remunerative basis. See, for example:

UNITED STATES SUPREME COURT:

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1893), reversing in part and affirming in part 51 Fed. 529; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming s. c. 64 Fed. 165; Cotting v. Kansas City, etc., Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, B. & W. 316 (1900); San Diego T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702.

FEDERAL COURTS:

Southern Pacific Ry. Co. v. Railroad Com., 78 Fed. 236, B. & W. 322 (1896); Missouri Pac. Ry. v. Keyes, 91 Fed. 47 (1898); Kimball v. Cedar Rapids, 79 Fed. 130 (1900); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Louisville & N. W. Ry. v.

§ 316. Interests of the public to be considered.

That there are in reality two tests, not one, is pointed out by the most discriminating judges in the more recent cases, and it is the avowed policy of the United States Supreme Court that both parties to the service, the carrier and the shipper, should be considered in deciding all cases. Thus, in the leading case of Smyth v. Ames,[9] the court, in declaring the Nebraska maximum freight law unconstitutional, guarded itself against being understood as taking an extreme position in favor of the carrier by saying: "It cannot therefore be admitted that a railroad corporation maintaining a highway under authority of the state may fix its rates with a view solely to its own interests and ignore the rights of the public. But the rights of the public would be ignored if rates for transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public and the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to its stockholders." And in Covington & Lexington Turnpike Road Company v. Sand-

McChord, 103 Fed. 216 (1900); Mathews v. Board of Corp. Com., 106 Fed. 7 (1901); Spring Valley Waterworks v. San Francisco, 124 Fed. 574 (1903); Palatka Waterworks v. Palatka, 127 Fed. 161 (1903).

STATE COURTS:

California—Spring Valley W. W. v. San Francisco, 82 Cal. 286, 23 Pac. 910 (1890).

Florida—Pensacola & A. R. R. v. Florida, 27 Fla. 403, 5 So. 833 (1889).

Illinois—City of Chicago v. Rogers Pk. Co., 214 Ill. 212, 73 N. E. 375 (1905).

Nebraska—State v. Sioux City, etc., R. R., 46 Neb. 682, 65 N. W. 766 (1896).

Pennsylvania—Brymer v. Butler Water Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897).

[9] 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming s. c. 64 Fed. 165 (1896).

ford,[10] the court, in questioning the State legislation, said similarly: "A corporation is not entitled as of right and without reference to the interests of the public, to realize a given per cent. upon its capital stock. Stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." [11]

[10] 164 U. S. 596, 41 L. Ed. 566, 17 Sup. Ct. 198 (1896).

[11] See, also:

UNITED STATES SUPREME COURT:

Munn v. Ill., 94 U. S. 113, 24 L. Ed. 77, B. & W. 71 (1876), affirming Munn v. People, 69 Ill. 80; Peik v. Chicago N. W. Ry., 94 U. S. 164, 24 L. Ed. 97 (1876), affirming s. c. 19 Fed. 625; Covington & Lexington Turnpike R. Co. v. Sanford, 164 U. S. 596, 41 L. Ed. 561, 17 Sup. Ct. 198 (1896), reversing s. c. 20 S. W. 1031; Minneapolis & St. L. R. R. v. Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 901 (1902), affirming s. c. 80 Minn. 191, 83 N. W. 60 (1900).

FEDERAL COURTS:

Wells v. Oregon Ry. & Nav. Co., 15 Fed. 561 (1883); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Interstate Com. Com. v. Louisville & N. R. R., 118 Fed. 613 (1902).

STATE COURTS:

California—Spring Valley W. W. v. San Francisco, 82 Cal. 286, 23 Pac. 910 (1890); Redlands L. & C. D. Water Co. v. Redlands, 121 Cal. 363, 53 Pac. 843 (1898).

Colorado—Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487, 2 Am. St. Rep. 603, B. & W. 301 (1887).

Florida—Pensacola & A. R. R. v. Fla., 27 Fla. 403, 5 So. 833 (1889).

Illinois—Clinton Electric L. H. & P. Co. v. Snell, 196 Ill. 626, 63 N. E. 1082 (1902).

Maine—State v. Edwards, 86 Me. 102, 29 Atl. 947, 41 Am. St. Rep. 528, 25 L. R. A. 127 (1893); Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

Massachusetts—Janvrin, Petitioner, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319 (1899).

Minnesota—Steenerson v. Great No. Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

§ 317. Accommodation of the interests of both sought.

The effort of the law therefore is to accommodate the more or less conflicting interests of the companies and of the public. How difficult this problem is may be seen from the language of a judge [12] who has given this matter much thought: "Then, their reasonableness relates to both the company and the customer. Rates must be reasonable to both, and, if they cannot be to both, they must be to the customer. That the amount of investment does not control either way is decided in San Diego Land & Town Company v. Jasper,[13] and Stanislaus County v. San Joaquin, etc., Co.[14] In the former case the court said that the rule that the company is entitled to demand a fair return upon the reasonable value of the property at the time it is being used for the public 'is decided as against the contention that you are to take the actual cost of the plant, annual depreciation, etc., and to allow a fair profit on that footing over and above expenses.' And in the latter the court said, 'To take the amount actually invested into 'estimation' does not mean necessarily that such amount is to control the decision of the question of rates.' So that, while it is strictly true that the company is entitled to no more than a reasonable return upon its necessary investment, which is embodied in the structure and its natural increment, if any, that goes but a little way towards the solution of the problem, owing to the difficulty of saying just what is reasonable in a given case. That must, for the most part, be left to the good judgment of the tribunal which passes upon each particular case." [15]

[12] Savage, J., in Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

[13] 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892.

[14] 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406.

[15] Compare the similarly cautious language employed by Harlan, J., in Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming 64 Fed. 165 (1896).

§ 318. When fair net earnings left, notwithstanding reduction of particular rates.

The rate on a single class of freight may be reasonable, though it is more or less than the average rate, and though it would, if applied to all freight, produce more or less than a fair return to the railroad company. In the case of Minneapolis and St. Louis Railroad v. Minnesota[16] the plaintiff railroad attacked as unconstitutional a rate fixed by the railroad commission for the carriage of coal. The railroad did not claim that the reduction of this rate alone would deprive it of a fair return, but only that if the reduced rate were applied to all freights the income of the road would be insufficient. The court held the rate legal, notwithstanding this fact. Mr. Justice Brown said: "Notwithstanding the evidence of the defendant that if the rates upon all merchandise were fixed at the amount imposed by the commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots. In Smyth v. Ames[17] we expressed the opinion that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons or property wholly within its limits must be determined without reference to the interstate business done by the carrier, or the profits derived from it, but it by no means follows that the companies are entitled to earn the same percentage of profits upon all classes of freight carried. It often happens that, to meet competition from other roads at particular points, the companies themselves fix a disproportionately low rate upon certain classes of freight consigned to these points. The right to permit this to be done is expressly re-

[16] 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 901 (1902), affirming 80 Minn. 191, 83 N. W. 60 (1900).

[17] 169 U. S. 466, 541, 42 L. Ed. 819, 847, 18 Sup. Ct. 418, 432, B. & W. 347, 350 (1898), affirming 64 Fed. 165 (1896).

served to the Interstate Commerce Commission by section 4 of that act, notwithstanding the general provisions of the long and short haul clause, and has repeatedly been sanctioned by decisions of this court. While we never have decided that the commission may compel such reductions, we do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the commission in this particular.

"In exercising its power of supervising such rates the commision is not bound to reduce the rates upon all classes of freight, which may perhaps be reasonable, except as applied to a particular article; and if, upon examining the tariffs of a certain road, the commission is of opinion that the rate upon a particular article, or class of freight, is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate." [18]

TOPIC B—THE PARTICULAR RATES CONSIDERED SEPARATELY.

§ 319. Reasonableness of the separate rates.

The question of the reasonableness of any separate rate is a much more complex one. The individual shipper ought not to pay more than his fair share of the whole amount received by the carrier; and what his fair share may be depends upon the nature of the goods carried, the expense of carrying them as compared with the carriage of other goods, and other similar

[18] Accord. Chicago & N. W. Ry. v. Dey, 35 Fed. 866, 1 L. R. A. 744 (1888); Pensacola & At. R. R. v. Florida, 27 Fla. 403, 5 So. 833 (1889).

considerations. On the other hand, fairness to the shipper requires that under no circumstances should he be forced to pay a rate greater than the value of the service rendered to him by the carrier, and this involves a determination of the value to him individually of the carriage, and also of the cost to the carrier of the particular carriage. It is obvious that all these considerations, which taken together enter into a determination of the reasonableness of the separate rate are rather vague, and that it will in the ordinary case be a matter of great difficulty to determine the question.[1]

[1] That the separate rates charged particular persons by a public service company must not be unfair to the person served is well established.
UNITED STATES SUPREME COURT:

Union Pacific Ry. v. U. S., 99 U. S. 402, 25 L. Ed. 274 (1878), reversing 13 Ct. Cl. 401; Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892), affirming 83 Mich. 592, 47 N. W. 489; Union Pac. Ry. v. Goodridge, 149 U. S. 680, 37 L. Ed. 896, 13 Sup. Ct. 970 (1893), affirming 37 Fed. 182; Covington & Lexington Turnpike Road Co. v. Sanford, 164 U. S. 596, 41 L. Ed. 561, 17 Sup. Ct. 198 (1896), reversing 20 S. W. 1031; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming 64 Fed. 165; Minneapolis and St. Louis R. R. v. Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 901 (1902), affirming 80 Minn. 191, 83 N. W. 60 (1900); San Diego & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming 110 Fed. 702.

FEDERAL COURTS:

Wells v. Oregon Ry. & Nav. Co., 15 Fed. 561 (1883); Interstate Com. Com. v. Lehigh Ry., 74 Fed. 784, appeal withdrawn, 82 Fed. 1002, 27 C. C. A. 681 (1897); Atlantic & P. Ry. v. U. S., 76 Fed. 186 (1896); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Interstate Com. Com. v. Louisville & N. R. R., 118 Fed. 613 (1902).

STATE COURTS:

California—Spring Valley W. W. v. San Francisco, 82 Cal. 286, 23 Pac. 910 (1890); Redlands' L. & C. D. Water Co. v. Redlands, 121 Cal. 363, 53 Pac. 843 (1898).

Colorado—Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603, B. & W. 301 (1887).

Florida—State v. Seaboard Air Line (Fla.), 37 So. 658 (1904).

Illinois—Clinton Electric L. H. & P. Co. v. Snell, 196 Ill. 626, 63 N. E. 1082 (1902).

§ 320. **Value of the service to the person served.**

It is highly desirable, if not indispensible, that no more should be charged the individual patron than the service is worth to him. This principle is acutely stated in Brunswick & Topeham Water District v. Marine Water Company[2] by Mr. Justice Savage: "The second requested instruction is that: "The rule that the public—that is, the customers—may demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but as individuals, is to be invoked only for the protection of the public, and that in a case requiring its application it may result in reducing rates, even if reasonable within the rule stated in the foregoing request; never in raising rates otherwise fair to the company." We understand the purport of this request to be that a public service company cannot lawfully charge, in any event, more than the services are reasonably worth to the public as individuals, even if charge so limited would fail to produce a fair return to the company upon the value of its property or investment. Such, we think, is the law. We have already so stated in the discussion of the preceding request. In the Waterville case[3] we said: The public—that is, the customers—may demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but

Maine—State v. Edwards, 86 Me. 102, 29 Atl. 947, 41 Am. St. Rep. 528, 25 L. R. A. 127 (1893); Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902); Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

Michigan—Grand Haven v. Grand Haven Water Works, 119 Mich. 652, 78 N. W. 890 (1899).

Minnesota—Steenerson v. Great No. Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897); State v. Minneapolis & St. L. Ry., 186 U. S. 257, affirming 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514 (1900).

Mississippi—Alabama & V. Ry. v. Railroad Commission (Miss.), 38 So. 356 (1905).

North Carolina—North Carolina Corp. Com. v. Atl. Coast Line R. Co. (N. C.), 49 S. E. 191 (1904).

[2] 99 Me. 371, 59 Atl. 537 (1904).

[3] At page 202, 97 Me. page 20, 54 Atl., 60 L. R. A. 856.

as individuals. The value of the services in themselves is to be considered and not exceeded." The company engages in a voluntary enterprise. It is not compelled, at the outset, to enter into the undertaking. It must enter, if at all, subject to the contingencies of the business, and subject to the rule that its rates must not exceed the value of the services rendered to its customers. It has accepted valuable franchises granted by the state, franchises ordinarily exclusive for the time being, franchises which ordinarily debar the public from serving themselves satisfactorily in any other way; and in return it must perform the duties to the public which it has voluntarily assumed at rates not exceeding the value of the services to the public taken as individuals, and this irrespective of the remuneration it may itself receive."

§ 321. The complexities of the general problem.

So many considerations must be taken into account in passing upon rates that the problem is always a complex one. The difficulties, many of them, arise from the desire to give scope to a variety of principles which must inevitably come into a more or less irreconcilable conflict. The language of the Interstate Commerce Commission in dealing with the reasonableness of a particular rate called in question before it will be helpful again in gaining an appreciation of the conflicting principles involved.[4]

"The mandate of the Statute is that all rates must be reasonable and just, but how the reasonableness and justice of a rate are to be determined is not prescribed by the Statute, nor has any satisfactory test been evolved by transportation experts. Conflicts about rates arise from the conflicting interests of carriers and shippers. As carriers make their own rates, they have primary regard for their own interests, and often give less

[4] Delaware State Grange v. New York P. & N. Ry., 3 Int. Com. Rep. 554, 4 I. C. C. Rep. 588 (1891).

weight than they ought to the interests of those they serve. This is more frequently the case in the absence of competition. Under the stress of competition, or sometimes for the purpose of developing business, rates that are equitable or even very low are likely to be made. But when a controversy arises between the public and a carrier, the question of the reasonable limit of a rate usually involves many considerations, and is often difficult to determine. A rate that might be regarded as reasonable and just by a producer and shipper, might, from a carrier's standpoint, be deemed extremely unreasonable and unjust, and so, conversely, a rate that a carrier might claim to be reasonable in itself, and that it might support with strong reasons based upon the cost of the service, the quantity of the business and the characteristics of its line of road, might exhaust the greater part of the proceeds of the producer's commodity, and be destructive to his interests. It is only stating a truism, therefore, to say there is no recognized test of a rate mutually reasonable for a carrier and for the producer of the traffic. The reasonableness of a rate must consequently be ascertained in every instance in which the question arises, by its relations both to the carrier and to the shipper, and by comparison with rates normally charged for like or similar service."

§ 322. Application of both tests necessary.

It must therefore be assumed, as the basis of further discussion, that not only is it desirable that the company performing the service should have a fair return, but that it is also desirable that the person served should pay no more than a fair price for the service rendered. And it must be recognized, as in many legal situations, that both of these desirable things cannot be brought about in a particular case very often to their full extent; but that it is a case where concession must be made from each principle. This point was well made by the Interstate Com-

merce Commission[5] in dealing with a difficult problem, which could not have been solved without some compromising of the sort just described. The opinion is a long one, but its basis may be seen in the following paragraph:

"Counsel representing the western roads in the progress of the investigation insisted that the rate of charges which a road may justifiably and reasonably make on its business largely depends upon how much business it has to do, and that the much greater tonnage on eastern roads indicated the much higher basis of charges necessary to be made and which might reasonably and lawfully be made on western roads; that every road has a right to live and must derive from the business it has to do a sufficient income to meet its obligations, which are to operate its road, pay interest on its indebtedness and a dividend on the capital stock; and that any rates which, with other rates on the same road, taken altogether, do not yield a revenue more than sufficient for these purposes, are neither unreasonable nor unjust to the shipper. We have already shown that some qualification need be made to the rule here laid down as the measure of reasonable rates. The rule insisted upon would involve the right to increase rates as often as a new road was built, where roads were already ample for the business. There are eight roads or lines carrying between Chicago and Kansas City; a less number might do the business as well and cheaper. If eight more were built the rates might need to be doubled if all roads constructed have a right to such income as will meet the obligations of the companies owing them."[6]

[5] Re Freight Rates on Food Products, 3 Int. Com. Rep. 93 (1892).

[6] Much the same language is used in Covington & Tex. T. Road v. Sanford, 164 U. S. 596, 41 L. Ed. 561, 17 Sup. Ct. 198 (1896), reversing s. c. 20 S. W. 1031; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898), affirming s. c. 64 Fed. 165; San Diego Land & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; San Diego Land & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming 110 Fed. 702; Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856

§ 323. **Relation of a particular rate to a whole schedule.**

The general method in passing upon the reasonableness of rates is therefore to discover whether the particular rate is fair, judging the schedule as a whole. As has been seen, this involves the consideration of many factors, some of them conflicting, but it may be said that rates fixed are fair to the company if from the schedule as a whole it gets a reasonable return, and fair to the people served if they pay in each particular case no more than the service is worth. In order to meet, as far as may be, both requisites, a particular rate should seldom be passed upon without considering the relations to the schedule as a whole, especially as the reasonableness of one rate may be judged with reference to other rates in the same schedule. An example of the way in which such problems are worked out, considering all factors and then giving most weight to one held to be controlling in the particular case, may be seen in various cases before the Interstate Commerce Commission, for example, in one case [7] the problem and its solution are stated thus: "The Central of Georgia Railway Company insists that if compelled to make the rate to Macon and Griffin the same it must either raise the Macon rate and thereby lose entirely that business, or lower the rate to Griffin and other intermediate points, and thereby lose in revenue the difference between the present and the reduced rates; and it earnestly maintains that any reduction of its present revenues would be unwarranted. To inquire whether the revenues of this railway company might be or ought to be reduced below the present point would raise several interesting and important questions, for the consideration of which we have not before us in this case the necessary data. We are furnished with a statement of the funded debt and capitalization of the road, and also with a statement of its financial operations for the last year. We are not informed how this debt was created, what

(1902); Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

[7] Brewer & Haulerter v. Louisville & N. Ry., 7 I. C. C. Rep. 224 (1897).

it would cost at the present time to replace the property represented by this capitalization, nor what that property is fairly worth, if indeed there be any standard by which its value can be measured. It appears that the company is now earning at the present rates a fair return on considerably more than the probable cost of constructing and equipping the road at current values. If the rates to all intermediate points between Atlanta and Macon were adjusted to the Macon rate, the loss in revenue would be $1,231.35. We should hardly assume that a reduction in revenue to this small amount would cripple a railroad with a net income from operation of over $1,000,000. Nor is it certain that there would be any reduction in earnings since the increased business consequent upon the lower rate might more than make good that loss. We see nothing in this phase of the case which would cause us to hesitate in requiring this defendant to bring its rates into conformity with the statute.[8]

[8] The relation of particular rates to the whole schedule is elaborately discussed in Book II, Part I, Title II, of this treatise. Very few judicial cases discuss the elements of the problem. In the following cases the matter is treated at large:

UNITED STATES SUPREME COURT:

Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892), affirming s. c. 83 Mich. 592; St. Louis & S. F. Ry. v. Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484, affirming s. c. 54 Ark. 101, 15 S. W. 18 (1895); Lake Shore & M. S. Ry. v. Smith, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. 565 (1899), reversing 114 Mich. 460, 72 N. W. 328; Chicago, M. & St. P. Ry. v. Thompkins, 176 U. S. 167, 44 L. Ed. 418, 20 Sup. Ct. 336 (1900), affirming s. c. 90 Fed. 363 (1898); Minneapolis & St. L. Ry. v. Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 901 (1902), affirming 80 Minn. 191, 83 N. W. 60 (1902).

FEDERAL COURTS:

Trammel v. Dinsmore, 92 Fed. 714, reversed in 102 Fed. 794 (1900), and judgment in last case affirmed 183 U. S. 115, 46 L. Ed. 111, 22 Sup. Ct. 46 (1901); Louisville & N. Ry. v. McChord, 103 Fed. 216 (1900); Chicago, M. & St. P. Ry. v. Smith, 110 Fed. 473 (1901); Interstate Com. Com. v. Louisville & N. R. R., 118 Fed. 613 (1902).

STATE COURTS:

Florida—State v. Seaboard Air Line (Fla.), 37 So. 314 (1904); State v. Atlantic Coast Line, et al. (Fla.), 37 So. 652 (1904); State v. Atlantic

§ 324. Possibility of increase of business if rates are lowered.

The last suggestion in the preceding paragraph, that a reduction ordered in rates may be justifiable if it appears certain that there will be no reduction in earnings as a result, since the increased business consequent upon the lower rate might more than make good that loss, although of some force from a theoretical point of view, must obviously be acted upon in an actual case with the greatest caution. This was one of the many matters discussed in the important case of Chicago & Northwestern Railway v. Dey.[9] Mr. Jusice Brewer disposed of it in this wise: "Again, it is said that it cannot be determined in advance what the effect of the reduction of rates will be. Oftentimes it increases business, and who can say that it will not in the present case so increase the volume of business as to make it remunerative, even more so than at present. But speculations as to the future are not guides for judicial actions; courts determine rights upon existing facts. Of course, there is always a possibility of the future; good crops may increase transportation business, poor crops reduce; high or low rates may likewise affect; but the only fair judicial test is to apply the rates to the business that has been done in the past, and see whether, upon that basis, such rates will be remunerative, or compel the transaction of business at a loss."

§ 325. Inherent difficulties in accommodating all tests.

Whenever the reasonableness of a particular rate charged for a particular service is brought in question there will often be difficulties in accommodating both of these tests which may sometimes seem inseparable. But these difficulties are inherent in the problem, and it is never justifiable not to take both of these

Coast Line (Fla.), 37 So. 657 (1904); State v. Seaboard Air Line (Fla.), 37 So. 658 (1904).

Minnesota—Steenerson v. Great No. Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

[9] 35 Fed. 883, 1 L. R. A. 744 and note (1888).

tests into account in passing upon a particular rate in its relations to the schedule as a whole. A good illustration of the way in which this sort of problem must be handled may be seen in the extract from a recent case before the Interstate Commerce Commission, which follows: [10] "It is further contended in behalf of the defendants that lumber, considering its character and all the conditions incident to the services rendered in its transportation, was not, at the 14-cent rate in force at the date of the advance, yielding its proper proportion of the revenue required by the defendants to meet their expenses—in other words, that that rate as applied to lumber was not a reasonable rate, viewed from the carrier's standpoint, in that it was not adequately remunerative. The question of the reasonableness in this sense of a rate on a single article of traffic is one of almost insuperable difficulty."

"In Smyth v. Ames,[11] there was involved an entire system of rates applicable to all traffic on the roads in the State of Nebraska and not the rate on a single commodity or article of traffic. In that case the Supreme Court held that the carrier is entitled to earn 'a fair return upon the value of that which it employs for the public convenience.' The value of the entire property of a road employed for the public convenience can shed but little, if any, light upon the question whether the rate on a single among thousands of articles of traffic yields its proper proportion of a fair return on that value. The rate on one article of traffic may be reasonably high and the carrier fail to earn a fair return on the value of the entire property employed for the public convenience because of unreasonably low rates on other traffic, and, vice versa, the rate on one article of traffic may be unremunerative or unreasonably low and the return to the carrier from its entire business may be fair or reasonably high, the de-

[10] Central Yellow Pine Assn. v. Illinois C. Ry., 10 Int. C. C. Rep. 530 (1904).

[11] 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming s. c. 64 Fed. 165 (1896).

ficiency under the rate on the one article of traffic being made up by the rates on the balance of the traffic."

§ 326. Governmental regulation for the best interests of all concerned.

It may fairly be said that governmental regulation, protecting both the public-service companies and the people whom they serve, ought be for the best interests of all concerned, if it is a policy which is to commend itself to sober judgment. But there is every indication, when the evidence is considered as a whole, that State control will be exercised in the most of cases in that spirit. To quote one judge from the many who have expressed similar sentiments: "We do not under-estimate the gravity and importance of the interests involved in this controversy. The record has been given that anxious and deliberate consideration, seemingly appropriate, and which, besides, was made necessary by its great volume and complexity. The railways of our country have been aptly said to constitute the arteries of the national life. The public official or other person who would grudge to them the large measure of prosperity which their inestimable services to the country deserve is as short-sighted as unpatriotic, as narrow as unjust. While this is true, the mistakes or excesses of zeal or judgment on the part of railway officials may at times make these cast enterprises, ordinarily benevolent, instrumentalities of grave private wrong and communal injury. The framers of the Constitution, though unconscious of the indescribable development in the intercommunication of the people, yet 'prophetic and prescient of all the future had in store,' provided for every contingency when it bestowed upon Congress the tersely expressed but elastic power 'to regulate commerce with foreign nations and among the several States.' Congress has exercised this power, and the righteous orders of the great commission it has primarily entrusted with the tremendous duty should in all proper cases be respected and enforced by the courts of the country. The organic law upon

which this power in Congress and in the courts is founded is the sure guaranty to investors in transportation lines against the assaults, whether of the agragrian or the demagogue, the anarchist or the mob. While, on occasion, the railway company or other corporation may suffer a temporary diminution of revenues from an order of this character, the interest of the public, and in the end the interest of the corporation itself, is conserved. In all such cases the general welfare should control. *Salus populi est suprema lex.*" [12]

§ 327. State of the authority upon the general subject.

The question is the same where the reasonableness of the rates of any public-service company are in question. In studying the principles on which railroad rates are regulated it is therefore, at times, just as important to consider decisions upon the regulation of the rates of gas or water companies, for instance, as to consider cases where rates for carriage of passengers or goods were in question. In the following chapters cases will be considered involving the fixing or regulation of rates of any public-service company; because, as the judicial authority upon this general question is so meagre, every case bearing upon the problem must be used, and used as many times as it has distinct points.

The consideration of the reasonableness of rates by the courts, though always recognized as within their powers, has only lately been practiced in fact; and the authorities for the proper determination of the carrier's rates are all recent, and are few in number. So recent is the careful consideration by the courts of this topic, that the courts have been compelled in most cases to enter into a very full and careful examination of the whole question. The task of a commentator is therefore very largely that of an editor and critic of the opinions of the courts. The best presentation of the subject, it is believed, will involve a full

[12] Speer, District Judge, in Interstate Com. Com. v. Louisville & N Ry., 118 Fed. 613 (1902).

statement of the reasoning of the courts in the recent cases, and it is deemed best to present this reasoning usually in their own language.

In addition to citation from the reports of the judicial courts of the cases involving rate regulation, extended extracts are given from the Interstate Commerce Commission reports of proceedings before them, and from the reports of such of the State railroad commissions as print their findings upon particular cases. This is regarded as in every way justifiable. These commissions are intrusted to a greater or lesser extent with the duty to pass upon the reasonableness of rates fixed by the public-service company, and to some is given the power to fix rates to a greater or less degree. It is obvious that these commissioners have a certain technical skill that the judges could not be expected to have, and that, moreover, the principles employed by them must be very largely the ones used by the courts themselves in reviewing the action of the commissions. It is as much public-service law by whatever body it is enounced, therefore, and it is of as much importance to practicing lawyers, who may be called upon to appear in the original proceedings before the commission as often as in the subsequent proceedings before the judicial courts.

TITLE I.

Reasonableness of Schedule as a Whole.

CHAPTER XII.

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TOPIC A—ENUMERATION OF THE THEORIES FOR ESTIMATING CAPITAL.

§ 331. The various theories suggested.

In order to decide upon what principles the amount of capital invested in the business of a carrier and entitled to a return should be estimated, it is important in the first place to state with precision and to examine with care the various theories which have been suggested for determining the amount. There has been no agreement of all the authorities on this question, and

no theory can be preferred (if indeed any one theory can properly be adopted) until all have been considered.

An excellent enumeration of the various theories for determining the true capital was made by the Railroad Commission of Massachusetts.[1] It may be summarized thus:

There are two bases on which, in a case like this, purchased railway properties can be capitalized: (1) their fair value without regard to the cost; and (2) their actual cost to the purchasers. There is a manifest difference between the two bases, and the one or the other will have to be selected as the correct basis. It may be well, in the first place, to consider how, and with what results, each may be applied to the facts of the present case.

(1) If it be assumed, as the petitioner contends, that the "fair value" is the right basis, we at once encounter the question how this value is to be ascertained. (i) The original cost of the property. From this must be deducted an allowance for depreciation, if the plant has not been kept in good condition; and allowance must also be made for a decrease, if any, in the price of materials since the construction. (ii) The structural value of the property, by which is meant "the value of the railway as a structure for service and wear, and not its speculative value based on the probable amount of its traffic and earnings. The former, which may be called the structural value, is measured by the present cost of building and equipping a new railway of the same description and physical character, with a proper deduction for such depreciation as has taken place in the railway under valuation." (iii) The earning capacity of the property, which may be based on past experience, partly on expert prophecy. (iv) The market value of the property, which might be indicated by the price obtained upon an auction sale of the property.

(2) The other basis of capitalization, actual cost, means the

[1] In re Interstate Consolidated St. Ry., Mass. R. R. Coms. 1896, 165.

amount which the purchased properties have actually cost the corporation or its stockholders in cash, including not only the specific price, but such other legitimate and necessary cash expenditures as actually and in good faith have been incurred in effecting the purchase, securing the title, and putting the railways in fit condition for use.

One sees that in the above enumeration all possible theories of capital charge in which there is any sense have been stated by the Massachusetts commission. Each of these proposed bases for capitalization will be considered in detail in this chapter, for each of them has its advocates, as one who has followed the current discussions of the problem will know.

§ 332. Comparison of these theories of capital charge.

Within a few years the Interstate Commerce Commission had occasion to inquire into the justification for the advance in freight rates, which was being made by the trunk lines, in respect to many parts of their schedules. It was urged by counsel that the railroads should have the right to advance rates until it was shown that they were earning more than a fair return upon their then actual capitalization. The commission therefore felt called upon to indicate their views upon this troublesome question of the proper basis of capital charges. They [2] discussed and criticised all of the existing theories, and to make clear their transitions, these diverse theories are indicated by numbers as they appear in the rather extended quotation from their opinion which follows.

§ 333. Cost of reproduction as a basis.

[1] "The cost of reproducing railway property has been suggested as a basis upon which return should be allowed. But this, while of great assistance in arriving at a just result, could not be taken as an exclusive guide. Many of our railways were

[2] Re Advance in Freight Rates, 9 I. C. C. Rep. 391 (1902).

built years ago, when the cost of construction was much greater than now. In the development of that industry they have been reconstructed and improved. The first outlay has perhaps been rendered practically worthless, and a railway honestly managed, never having paid excessive dividends, may actually represent to-day much more money than the present cost of building. Those who originally invested their money in this enterprise and have kept pace with the public necessities ought not to be required to bear the entire burden of this shrinkage. Moreover, the value of a railway system does not depend upon the mere cost of its embankment or its equipment. It is rather a question of location, of connections, of terminal facilities, of enterprises along its line; and shall nothing be allowed to the foresight and ability which have marked out and perfected that system?" [3]

§ 334. Money invested as a basis.

[2] "It is often urged that the money actually invested in a railway ought to furnish a basis upon which returns should be made, and this is at first thought a plausible suggestion and might in many cases be a reasonably just one. In many cases it would not. It was said in argument before the commission recently that the capitalization of the Mobile & Ohio Railway represented the actual money which had been invested in that property, and no more. This road was largely obliterated by the civil war, and was operated at great loss during that war. All this is now represented in its capital stock. Should the stockholders of that railway company be indemnified for the loss of their property when almost every species of property in that section was destroyed. Where there is no question of war, or its devastations, the money actually paid into a railway property may represent all manner of waste and extravagance. Clearly the public ought not to pay this." [4]

[3] Re Advance in Freight Rate, *supra*. See §§ 358-361, *infra*.
[4] Re Advance in Freight Rates, *supra*. See §§ 338-345, *infra*.

§ 335. Outstanding capitalization as a basis.

[3] "It is frequently claimed that a railroad should be allowed to earn upon the basis of its capitalization. Such a test as this is even worse than the last preceding, for while money actually invested in a railway property may represent disaster or extravagance, or even positive dishonesty, there are numerous cases where the capital stock of such company represents absolutely nothing whatever. The Erie Railway is capitalized at the present time for nearly $300,000 per mile. The Lake Shore & Michigan Southern Railway, which is in a way a parallel and competing line, and in every sense better in point of construction and equipment, is capitalized for about $100,000 per mile. These two roads both carry grain from Chicago to New York; the Lake Shore much more economically than the Erie; and the rate must be the same by both. Which capitalization shall govern?" [5]

§ 336. Present value as a basis.

[4] "This question of the reasonableness of a rate, as controlled by the earnings of a railway, was considered by the Supreme Court of the United States in the Nebraska Freight Rate Case,[6] and in the course of that opinion the latter point referred to was specifically considered and passed upon. The railways there contended that they should be allowed to earn interest on their funded debts and a dividend upon their capital stock. This claim the court denied, saying that it could not be affirmed, as a matter of law, that a railroad was entitled to earn upon the basis of its capitalization. That case also establishes certain general principles upon which the reasonableness of rates from the revenue standpoint are to be decided. It is said as a conclusion of the whole discussion that the carrier is entitled to earn a 'fair return upon the value of that which it employs for the public convenience.' But what is the value of a railway?

[5] Re Advance in Freight Rates, *supra*. See §§ 345-351, *Infra*.
[6] 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898).

Does not that value depend almost wholly upon the rate which it is permitted to charge? If the rates upon a railway system are reduced without thereby stimulating the movement of traffic the value of the property is diminished. If its rates are advanced without loss of traffic the value of its property is increased. Stated in another way: the value of a railway depends upon what it can earn on the basis of a reasonable rate, and the reasonableness of a rate depends upon the return which it will yield upon the value of the property." [7]

§ 337. **Competition of these different theories.**

"The court pointed out in the above case certain elements which should be taken into account in determining the reasonableness of rates, and these were 'the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under the particular rates prescribed by statute, and the sum required to meet operating expenses.' The court added that there might be other matters proper to be regarded in estimating the value of the property, and did not indicate the relative importance which was to be assigned to the various matters specified. It is plain that until there be fixed, either by legislative enactment or by judicial interpretation, some definite basis for the valuation of railroad property, and some limit up to which that property shall be allowed to earn upon that valuation, that there can be no exact determination of these questions. In the absence of such a standard, the tribunal, whether court or commission, which is called upon to consider the matter, can only upon the whole exercise its best judgment." [8]

[7] Re Advance in Freight Rates, *supra*. See §§ 351-357, *infra*.
[8] Re Advance in Freight Rates, *supra*.

TOPIC B—THE ORIGINAL COST AS THE BASIS OF REGULATION BY THE COMMON LAW.

§ 338. The investment as the capital entitled to return.

The extreme doctrine, in accordance with which the company would be entitled to a fair return on the money actually invested, whether originally or during the operation of the company, and without regard to whether a profitable expenditure of the money was made by the company, is not often expressed in the cases. This view was, however, substantially held by the Supreme Court of Pennsylvania in Brymer v. Butler Water Company.[1] In the opinion of Mr. Justice Williams occurs the following passage: "In determining the amount of the investment by the stockholders it can make no difference that money earned by the corporation, and in a position to be distributed by a dividend among its stockholders, was used to pay for improvements and stock issued in lieu of cash to the stockholders. It is not necessary that the money should first be paid to the stockholder and then returned by him in payment for new stock issued to him. The net earnings, in equity, belonged to him, and stock issued to him in lieu of the money so used that belonged to him was issued for value, and represents an actual investment by the holder. If the company makes an increase of stock that is fictitious, and represents no value added to the property of the corporation, such stock is rather in the nature of additional income than of additional investment. This whole subject was brought to the attention of the learned judge by a request that he should find as a matter of law that the reasonableness of the charges must be determined with reference to the expenditure in obtaining the supply, and providing for a fund to maintain the plant in good order, and pay a fair profit upon the money invested by the owners, and that a rate which did no more than this was neither excessive nor unjust. This the learned judge refused to find, saying in reply to the request, 'we have no

[1] 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897).

authority for such a ruling, and it would be unjust to the consumer who would have to pay full cost of the water, provide a sinking fund, secure a reasonable profit upon the investment, and have no voice in the management of the business of the company. The act of assembly in this regard can bear no such construction.' This ruling cannot be sustained. The cost of the water to the company includes a fair return to the persons who furnished the capital for the construction of the plant, in addition to an allowance annually of a sum sufficient to keep the plant in good repair and to pay any fixed charges and operating expenses. A rate of water rents that enables the company to realize no more than this is reasonable and just."[2]

[2] The original cost is recognized as one element in the problem to be taken into account in:

United States Supreme Court:

Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028, affirming s. c. 49 Ark. 325 (1888); Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892), affirming s. c. 83 Mich. 592, 47 N. W. 489; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. 718 (1897), affirming s. c. 143 N. Y. 596, 26 L. R. A. 270, 33 N. E. 983; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898), affirming s. c. 64 Fed. 165; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; Cotting v. Kansas City S. Y., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30 (1901), reversing s. c. 83 Fed. 850 (1897); San Diego Land & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702.

Federal Courts:

Cleveland Gas Light Co. v. Cleveland, 71 Fed. 610 (1891); Southern Pacific Ry. v. Railroad Commissioners, 78 Fed. 236 (1896); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577 (1898); Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683 (1898); Spring Valley Waterworks v. San Francisco, 124 Fed. 574 (1903); Palatka Waterworks v. Palatka, 127 Fed. 161 (1903).

State Courts:

California—Spring Valley W. W. v. San Francisco, 82 Cal. 286, 23 Pac. 910 (1890).

Florida—State v. Seaboard Air Line (Fla.), 37 So. 658 (1904).

Iowa—Cedar Rapids Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081 (1902).

§ 339. Argument for the rule of total investment.

It is submitted that this rule that a return may be based upon the total investment sunk in the construction of the plant from first to last, with certain limitations, may be adopted not unreasonably by a public-service company in making up its own schedule of rates. The advantages of this rule, and the disadvantages of any other, are well set forth in a late Pennsylvania case, Wilkes-Barre v. Spring Brook Water Company,[3] brought under the statute which gave the court power to say whether the rates fixed by the water company in its schedule were unreasonable. In the particular case, the court found that allowing only one per cent. for depreciation, the net income available for dividends was 5 per cent. upon the total cost of construction. Mr. Justice Edwards, before whom the case was brought, held the schedule reasonable. He said, in part: "It may be contended that the rule adopted by our Supreme Court is somewhat arbitrary. But we know of no better one. The primary basis of any calculator as to the value of a water plant must be the money actually invested by the owners. If the earnings of the company have been used to improve the property, it is counted as so much more cash invested. In a case in another State, the market value of the plant was suggested as the proper basis of calculation. This is open to two objections. The plant, for

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902); Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

Massachusetts—Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977, B. & W. 328 (1901); Falmouth v. Falmouth Waterworks Co., 180 Mass. 325, 62 N. E. 255 (1902).

Nebraska—State v. Sioux City, etc., R. R., 46 Neb. 682, 65 N. W. 766 (1896).

Pennsylvania—Brymer v. Butler Water Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897); Wilkes-Barre v. Spring Brook Water Co., 4 Lack. Leg. News (Pa.), 367 (1899).

New York—In re City of Brooklyn, 143 N. Y. 590, 38 N. E. 983, 26 L. R. A. 270 (1894).

[3] 4 Lack. (Pa.) Leg. News, 367 (1899).

many reasons, may have depreciated in value and the consumers of water may have decreased in their number, thus working an injustice to the owners, or the plant, owing to favorable natural conditions and the rapid growth of the territory supplied, may have greatly enhanced in value, thus increasing the rates beyond reason and equity. Another rule would be to ascertain the cost of replacing the whole plant at a given time and make that the basis of the computation as to its value. This is open to the same objection as the first rule suggested."

§ 340. What is the actual cost.

The question of what is the actual cost of the plant was raised and much discussed in the case of the Town of Falmouth v. Falmouth Water Company.[4] A statute gave the plaintiff town a right to take the franchises and corporate property of the defendant company on payment of the actual cost with interest. The town exercised the right, and this suit was brought to determine the actual cost. The company had made a contract with a contractor to build its works, paying therefor at the completion of the contract the "market value at that time" of the works, with a certain percentage added, for engineering expenses. During the progress of the work the market value of machinery and materials materially advanced, so that the contract price paid by the company was much greater than the actual cost to the contractor. The town claimed that the "actual cost" which they were to pay was the actual cost to the contractor, plus an ordinary and reasonable profit; that the contract made by the company was "unusual and unprecedented," and ought not to bind the town.

The court held, without question, that the actual cost mentioned in the statute was the actual cost of the plant to the water company; and this cost they held to be the amount actually paid to the contractor under the contract. In reply to the argu-

[4] 180 Mass. 325, 62 N. E. 255 (1902).

ment that this contract was unusual and unprecedented, Mr. Justice Loring said: "It is argued by the town that this result amounts to substituting market value for actual cost, and actual cost excludes everything in the nature of a profit. It is true that actual cost excludes everything in the nature of a profit; but what is actual cost to the company includes a profit to the contractor, just as what is actual cost to the contractor includes a profit to the merchants of whom he buys his material. The company had to pay a profit to the contractor, as the contractor had to pay a profit to the material men. The legislature no more intended to open up the speculative question of the reasonableness of the profit made by the contractor in his contract with the company than that of the reasonableness of the profit made by the material men in their contract with the contractor. What it intended to do was to provide that the price to be paid by the town should not depend upon opinions as to the market value of the property when taken, but should be restricted to what it had cost the company, with interest at 5 per cent. That it did not forbid the company in the first instance fixing the price which it was to pay for the construction of its works at the market value on completion, if it thought it to be for the best interests of those interested in the corporation to make a contract for its plant on that basis." [5]

[5] Examination into the actual cost was suggested in:
UNITED STATES SUPREME COURT:

Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028, affirming s. c. 49 Ark. 325 (1888); Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892), affirming s. c. 83 Mich. 592, 47 N. W. 489; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1894), reversing in part and affirming in part 51 Fed. 529; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. 718 (1897), affirming s. c. 143 N. Y. 596, 26 L. R. A. 270; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming s. c. 64 Fed. 165; San Diego Land & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; San Diego Land & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702.

§ 341. Cost to the public service company enhanced by fraudulent contract.

It is clear, as was indicated in the case just examined,[6] that if the contract is collusively made with the contractor the company cannot rely on the contract price as the bona fide cost of the plant. If for instance the owners of the public service company should, either individually or through an independent corporation, such as a construction company, owned by them, make a contract for the payment of an extravagant price for doing the work, it would doubtless be necessary to go behind the form, and find the sum actually expended in the construction. But the court assumed, for the purposes of this proceeding, that the contract was made in good faith and without any ulterior motives with respect to the town and its right to take the property of the corporation.[7]

FEDERAL COURTS:

Cleveland Gas Light Co. v. Cleveland, 71 Fed. 610 (1891); Southern Pac. Ry. v. Railroad Commissioners, 78 Fed. 236, B. & W. 322 (1896); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 322 (1898); Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683, B. & W. 342 (1898); Spring Valley Waterworks v. San Francisco, 124 Fed. 574 (1903).

STATE COURTS:

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902); Brunswick & T. & W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

Minnesota—Steenerson v. Great Nor. Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897); State v. Minneapolis & St. L. Ry., 186 U. S. 257, affirming s. c. 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514 (1900).

[6] Falmouth v. Falmouth Water Co., 180 Mass. 325, 331, 62 N. E. 255, 258 (1902).

[7] To the same effect are: Dow v. Biedelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028 (1888), affirming s. c. 49 Ark. 325, 5 S. W. 297; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898), affirming s. c. 64 Fed. 165; Cleveland Gas Light Co. v. Cleveland, 71 Fed. 610 (1891); Southern Pacific Ry. v. Railroad Commissioners, 78 Fed. 236, B. & W. 322 (1896); Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902); Steenerson v. Great No. Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

§ 342. Unwise construction.

It may turn out in some cases that some parts of the plant are of no value in the operation of the system at some later time. It would seem that in such cases the question should be whether the expenditure seemed wise at the time it was made; if so that expenditure should be considered like any other. This was well said in Wilkes-Barre v. Spring Valley Water Company[8] in discussing one item in the cost of the plant. "The Huntsville plant, especially the filter. This plant and filter are a part of the property of the Wilkes-Barre Water Company. The filter cost about $122,000. The evidence is not clear as to other items, except as to the pipe line carrying the Huntsville water, which cost over $37,000. The Huntsville water was unwholesome for domestic use, and was finally condemned as such by competent authority. It had for years been used with water of better quality from other sources. In order to improve the quality of the Huntsville water the Wilkes-Barre Water Company purchased the filter in question. It was a proper purchase under the circumstances and unquestionably represents a part of the investment of the Wilkes-Barre Water Company. Whether under the present system its function is as important as under the old system is immaterial. The money it represents was judiciously expended. Even if the purchase of it was an error of judgment, which is not proven, it could not be eliminated from a statement giving the cost of the construction of the company's water plant."[9]

§ 343. Plant unnecessarily large.

It is plain, however, that if the plant as constructed is unnecessarily large the company should not expect a return upon their total investment. This is put in a striking manner

[8] 4 Lack. (Pa.) Leg. News, 367 (1899).

[9] But see Capital Gas Light Co. v. Des Moines, 72 Fed. 829 (1896).

in a recent case, thus:[10] "It is true that the fair value of the property used is the basis of calculation as to reasonableness of rates, but as was pointed out in the Waterville case, this is not the only element of calculation. There are others, as for instance, the risk of the incipient enterprise, on the one hand, and whether all the property used is reasonably necessary to the service, and whether as a structure it is unreasonably expensive, on the other. For a simple illustration, suppose that a five hundred horse power engine was used for pumping when a one hundred horse power engine would do as well. As property to be fairly valued the larger engine might be more valuable than the smaller one, yet it could not be said that it would be reasonable to compel the public to pay rates based upon the value of the unnecessarily expensive engine.[11]

§ 344. Portion of plant not yet in use.

In Capital City Gaslight Co. v. Des Moines[12] it appeared that a holder had lately been erected larger than what was "under present circumstances profitably necessary." It was held that a proper allowance should be made for the unnecessary cost thereby occasioned. It also appeared that the company held an option for the purchase of certain real estate not at the time actually occupied in the operation of its gas plant, and to secure the option paid rent for the land; and this rent was included among the operating expenses. The court said: "While it may be, as claimed, good business policy on the part of plaintiff to hold this land under the present option, looking to its purchase hereafter in the growth of the plant, I question whether plaintiff may at this time rightfully insist that this rental shall be placed among its proper expenses, in estimating which proof is not

[10] Per Savage, J., in Brunswick & T. W. D. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

[11] See, also, Capital Gas Light Co. v. Des Moines, 72 Fed. 829 (1896).

[12] 72 Fed. 829 (1896).

clear but that a small portion of this land was actually and necessarily occupied by plaintiff in operating its gas plant." [13]

§ 345. Cost of unsuccessful experiments.

In the same case [14] the court said: "Nor should there be included any amounts expended or investments made by plaintiff in its attempt or experiment, however laudable these attempts may have been, to supply fuel gas to the citizens of Des Moines, and which were expended or invested in directions not now required, or not properly serviceable for the company's present uses. These must be laid aside, among any other unprofitable investments in the history of the company. These may evidence the creditable desire of the company to keep its works fully abreast with progressive idea of gas making. But they are now of no market value. In other words, the court may not now regard the rates as properly to be increased above what would otherwise be reasonable for the purpose of allowing plaintiff to recoup losses heretofore incurred in any unfortunate or unprofitable investments it has made, or to charge and receive interest on losses thus incurred." [15]

TOPIC C—OUTSTANDING CAPITALIZATION INCONCLUSIVE.

§ 346. Watered stock.

If stock is issued for no real consideration, or for more than the actual consideration received, it clearly cannot be taken as any indication of the capital. This was vigorously said by Mr. Justice Harlan in a leading case: "It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view

[13] See, to the same effect, Steenerson v. Gt. Northern Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

[14] Capital City Gaslight Co. v. Des Moines, *supra*.

[15] But see Milwaukee Electric Ry. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898).

solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

"If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of ralizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the coporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged." [1]

[1] Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898).

Outstanding capitalization was held inconclusive in:

UNITED STATES SUPREME COURT:

Dow v. Biedelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028 (1888), affirming 49 Ark. 325; Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892), affirming s. c. 83 Mich. 592, 47 N. W. 489; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1894), reversing in part and affirming in part s. c. 51 Fed. 529; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898), affirming s. c. 64 Fed. 165; Lake Shore & Mich. So. Ry. v. Smith, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. 565 (1899), reversing 114 Mich. 460, 72 N. W. 328; San Diego Land & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702; Stanislaus Co. v. San Joaquin Canal & Irrigation Co., 192 U. S. 201, 48 L. Ed. 406 (1903), reversing s. c. 113 Fed. 930.

FEDERAL COURTS:

Cleveland Gas Light Co. v. Cleveland, 71 Fed. 610 (1891); Southern Pac. Ry. v. Railroad Commissioners, 78 Fed. 236 (1896); Chicago, M.

§ 347. **Nominal capitalization unconclusive.**

Little if any weight therefore is to be attached to the nominal capitalization of the company, even although these shares may now be in the hands of innocent holders. For these holders purchased with imputed knowledge of the public service law by which the state may reduce the rates without unconstitutionality to a point where they will yield no more than a fair return upon actual values. The rule that nominal capitalization is inconclusive in a question as to the validity of a reduction of rates is put strongly in another case[2] before the Interstate Commerce Commission, where Commissioner Prouty said: "The mere capital account of a railroad does not furnish a conclusive basis by which to adjust the amount of its earnings, for the reason, among others, that the capitalization of the railroads of the United States does not represent the actual amount of money invested in the properties, nor the actual value of the properties themselves from any standpoint. There is a continual temptation to increase the liabilities of a railroad company without any corresponding increase in actual value. Whatever of wasteful-

& St. P. v. Smith, 110 Fed. 473 (1901); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903).

California—Spring Valley Water Works v. San Francisco, 82 Cal. 286, 22 Pac. 910 (1890); Redlands L. & C. D. Water Co. v. Redlands, 121 Cal. 363, 53 Pac. 843 (1898).

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

Massachusetts—Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977, B. & W. 328 (1901).

Minnesota—Steenerson v. Great Nor. Ry., 69 Minn. 353, 72 N. W. 713 (1897).

[2] Grain Shippers Assn. v. Illinois C. Ry., 8 I. C. C. Rep. 158 (1900). Of the cases cited in the preceding section see, especially: Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028 (1888), affirming s. c. 49 Ark. 325; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming s. c. 64 Fed. 165; Cleveland Gas Light Co. v. Cleveland, 71 Fed. 610 (1891); Chicago, M. & St. P. Ry. v. Smith, 110 Fed. 473 (1901); Steenerson v. Great No. Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

ness or mismanagement there may have been in the construction or antecedent history of the railroad, whatever of jobbery or of thievery, even, is apt to find its way into the capital account until it is eliminated by some process of reorganization. In the reorganization itself, the capitalization has no relation ordinarily to the actual value of the property, but is made to depend upon the convenience or even the whim of those who manipulate the reorganization scheme. To make the capital account of our railroads the measure of their legitimate earnings would place, as a rule, the corporation which has been honestly managed from the outset under enormous disadvantages."

§ 348. Stock issues outstanding deceptive.

Those who examine into these questions even in the most superficial manner are soon convinced of one thing, and that is that the outstanding stock issues do not necessarily constitute a proper basis for the capital charge. This contention is well disposed of by Commissioner Prouty in a proceeding respecting certain rates of the Southern Railway;[3] a part of his opinion follows: "The Southern Railway shows that in the year 1899 it earned nothing upon its $120,000,000 of common stock, and urges that any order of this Commission which depletes the revenues of that company deprives the owners of this stock of their property without due process of law.

"This common stock was issued as a part of a reorganization scheme under which the Southern Railway Company came into existence. It does not appear than the persons to whom this stock was originally issued ever paid one dollar in actual value

[3] Danville v. Southern Ry., 8 I. C. C. Rep. 409 (1901). To the same effect are: Dow v. Beidelmay, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028 (1888), affirming s. c. 49 Ark. 325; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming s. c. 64 Fed. 165; Steenerson v. Great No. Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897); State v. Minneapolis & St. L. Ry., 88 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514 (1900).

for it. It simply appears that the stock is outstanding. This is not enough. Something more is needed when a claim of this kind is set up than the mere fact of the existence and amount of capitalization. It does not rest in the whim of a reorganization committee in Wall Street to impose a perpetual tax upon that whole southern country. In the year 1899 the Southern Railway earned net about 4 per cent on $40,000 a mile of the mileage of its entire system. That system extends, as a rule, through sparsely populated territories; no difficult and expensive engineering feats were involved in its construction, nor has it in proportion to its extent many expensive terminals. It will hardly be claimed that the cost of reproducing that property in its present state would equal $40,000 a mile."

§ 349. **Bonded indebtedness beyond present value of security.** Few cases go so far as refuse to recognize the validity of the claim to interest upon bonds, even when the security has depreciated, but in Steenerson v. Great Northern Railway[4] Mr. Justice Canty said:

"In determining what are reasonable rates, it is perfectly immaterial whether the railroad is mortgaged for two or three times what it would cost to reproduce it, or whether it is free from incumbrance. To hold otherwise would be to hold that the state or the public have indirectly guaranteed the payment of the mortgage bonds of every railroad. The state may as well guaranty the bonds directly as indirectly. But neither the state nor the public have done either the one or the other. It is immaterial how the property has been split up into different rights, interests, and claims. For the purpose of fixing rates, the holders of all these stand in the shoes of the sole owner of the property, unincumbered. The rights of the bondholders are no more and no less sacred than the rights of such an owner."[5]

[4] 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

[5] Of the cases opposed, see, especially, Chicago & N. W. R. R. v. Dey, 35 Fed. 866, 1 L. R. A. 744 (1888).

§ 350. Cost of buying up constituent roads of the present system and converting them to electric roads.

In the case of Milwaukee Electric Railway and Light Company v. Milwaukee,[6] the plaintiff complained of a rate of fare fixed by ordinance of the defendant city, on the ground that it would not yield fair compensation for the use of the plant, and was for that reason unconstitutional. The plaintiff had obtained its street railway plant by buying five old horse railroads, combining them into a single system, and equipping them with electric power. The defendant claimed that the rate of fare fixed by ordinance would return a fair income on the existing value of the company's property. The court held, however, that under the circumstances the market value of the property was not the true basis for income; though at the same time they agreed that it is the value of the investment, and not the amount paid, which must control. The court found that the actual value of the company's property, based solely upon the cost of reproduction, was over five million dollars. But District Judge Seaman proceeded: "I am further satisfied that this amount is not the true measure of the value of the investment in the enterprise. It leaves out of consideration any allowance for necessary and reasonable investment in purchase of the old lines and equipments, which were indispensable to the contemplated improvement, but of which a large part was of such nature that it does not count in the final inventory. No allowance enters in for the large investment arising out of the then comparatively new state of the art of electric railways for a large system, having reference to electrical equipment, weight of rails, character of cars, and the like, of which striking instance appears in the fact that the electric motor which then cost about $2,500 can now be obtained for $800; so that work of this class was in the experimental stage in many respects, and the expenditures by the pioneer in the undertaking may not fairly be

[6] 87 Fed. 577, B. & W. 336 (1898).

gauged by the present cost of production." He allowed two million dollars as the minimum amount of these expenditures, not now appearing in the actual property, which ought to be added to the value of that property in order to give the present value of the investment.[7]

TOPIC D—PRESENT VALUE AS THE BASIS OF REGULATION BY LEGISLATION.

§ 351. Power to set aside a statutory rate.

It must be borne in mind that the problem presented to a court which is asked to set aside an established rate as unconstitutional because it amounts to a confiscation of property is not precisely the same problem as that presented to a court which is asked to pass upon the fairness of a rate established by a railroad or other public service company. If a statutory rate takes property the property affected by it is not the original investment, but the property actually existent and owned by the company. If it is a taking of property to deprive the owner of a fair return upon it, the return must be unfair as income derived from that actual property. In determining whether the return allowed to the railroad is a fair return on their property the property is that actually in use, at its present value. Where, however, the question is whether the company is exacting too great a return on its investment by means of an unfair schedule the question is as to the amount actually and bona fide invested. Justifying legislative rates therefore is one thing, and holding that unreasonable charges are not being made is quite another matter.

7 This is still a controverted point. See Wilkes-Barre v. Spring Brook Water Co., 4 Lack. Leg. News (Pa.), 367 (1899), in accord with the case discussed in the text. But see Steenerson v. Gt. Northern Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897), *contra*. Since by the prevalent rule discussed in the pages next following the present value of the property is made the basis of rate regulation, it is generally immaterial what has been the order of events leading up to the present corporation.

§ 352. Constitutional requirements.

The leading case on this point is Smyth v. Ames.[1] This was a suit to test the constitutionality of certain statutes regulating railroad rates. In the course of his opinion Mr. Justice Harlan said: "The corporation performing such public services and the people financially interested in its business and affairs have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantee for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it." Proceeding then to discuss the basis upon which the necessary amount of compensation was to be reckoned, he continued: "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the propable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and were to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

This principle has since been consistently followed. In San Diego Land & Town Company v. National City[2] the court was

[1] 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct 419, B, & W. 347 (1898).
[2] 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899).

asked to declare a certain water rate fixed by city ordinance for water supplied by the plaintiff company be declared unconstitutional as a taking of the plaintiff's property. The plaintiff contended that it was entitled to a fair return on the cost of its plant, with interest, allowance for depreciation, and profit. Mr. Justice Harlan said: "Undoubtedly, all these matters ought to be taken into consideration, and such weight given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed may be in excess of the real value of the property." [3]

[3] By the prevalent law the present value of the plant may be made the basis of rate regulation.

UNITED STATES SUPREME COURT:

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047, reversing in part and affirming in part 51 Fed. 529; San Diego Land & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; Chicago, M. & St. P. Ry. v. Tompkins, 176 U. S. 167, 44 L. Ed. 418, 20 Sup. Ct. 336 (1900), affirming s. c. 90 Fed. 363 (1898); Minneapolis & St. L. Ry. v. Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 901 (1902), affirming s. c. 80 Minn. 191, 83 N. W. 60 (1900); San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702; Stanislaus Co. v. San Joaquin C. & I. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 241 (1903), reversing s. c. 113 Fed. 930.

FEDERAL COURTS:

Cleveland Gas Light Co. v. Cleveland, 71 Fed. 610 (1891); Atlantic & P. Ry. v. U. S., 76 Fed. 186 (1896); Northern Pac. Ry. v. Keyes, 91 Fed. 47 (1898); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903).

§ 353. Original cost not necessarily the basis of capitalization.

While the original cost is to be considered to some extent, it is not controlling. In Ames v. Union Pacific Railway[4] Mr. Justice Brewer stated the elements of the problem thus:

"What is the test by which the reasonableness of rates is determined? This is not yet fully settled. Indeed, it is doubtful whether any single rule can be laid down, applicable to all cases. If it be said that the rates must be such as to secure to the owners a reasonable per cent. on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property,—injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property. These and many other things, as is well known, are factors which have largely entered into the investments with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property,

see Southern Pac. Ry. v. Railroad Commissioners, 78 Fed. 236 (1896); Metropolitan T. Co. v. Houston & T. C. R. R., 90 Fed. 683 (1898), *contra*.

State Courts:

California—Spring Valley W. W. v. San Francisco, 82 Cal. 286, 23 Pac. 910 (1890); Redlands L. & C. D. Water Co. v. Redlands, 121 Cal. 363, 53 Pac. 843 (1898).

Iowa—Cedar Rapids Co. v. Cedar Rapids, 118 Ia. 234, 91 N. W. 1081 (1902).

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902); Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

Minnesota—Steenerson v. Great No. Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897); State v. Minneapolis & St. L. Ry., 186 U. S. 257, affirming 80 Minn. 191, 83 N. W. 63, 89 Am. St. Rep. 514 (1900).

Pennsylvania—But see Brymer v. Butler Water Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897); Wilkes-Barre v. Spring Brook Water Co., 4 Lack. Leg. News (Pa.), 367 (1899).

[4] 64 Fed. 165 (1894), affirmed in Smyth v. Ames, 169 U. S. 466, 42 Law Ed. 819, 18 Sup. Ct. 418 (1898).

and not the cost, is that which would have to pay. In like manner, it may be argued that, when the legislature assumes the right to reduce, the rates so reduced cannot be adjudged unreasonable if, under them, there is earned by the railroad company a fair interest on the actual value of the property. It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or other of these represents it, and computation as to the compensatory quality of rates may be based upon such amounts. In the cases before us, however, there is abundant testimony that the cost of reproducing these roads is less than the amount of the stock and bond account, or the cost of construction, and that the present value of the property is not accurately represented by either the stocks and bonds, or the original construction account. Nevertheless, the amount of money that has gone into the railroad property—the actual investment, as expressed, theoretically, at least, by the amount of stock and bonds—is not to be ignored, even though such sum is far in excess of the present value."[5]

[5] This point is made in the following cases, among others: Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028 (1888), affirming s. c. 49 Ark. 325; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898), affirming s. c. 64 Fed. 165; San Diego Land & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702; Southern Pac. Ry. v. Railroad Commissioners, 78 Fed. 236, B. & W. 322 (1896); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902); Brunswick T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

§ 354. Present value may be shown to be less than actual cost.

It follows that present value may be shown to be less than actual cost. In San Diego Land and Town Company v. National City [6] Circuit Judge Ross said:

"Nor can it make any difference that the complainant, in the construction of its plant and the carrying on of its work, borrowed $300,000, on which it pays interest, and for which, it may be, it issued its bonds. The buyer of such bonds, like the loaner of money on a mortgage upon real estate, does so with his eyes open. The loaner of money on a mortgage knows that conditions may be such as to increase the value of his security, or they may be such as to decrease its value. He takes the chances that everybody must take who engages in business transactions. The buyer of bonds issued by a water company such as the complainant has the like knowledge, and the further knowledge that the law, which every one is presumed to know, prescribes that the rates to be charged for the water furnished by the company shall be established and fixed by a special tribunal, subject, as all state laws are, to the paramount provisions of the constitution of the United States, among which is one which secures such investors against the fixing of such rates as will operate to deprive him of his property without just compensation." [7]

§ 355. Original cost as evidence of actual value.

The original cost should be allowed in proof as evidence of actual present value. In Kennebec Water District v. Waterville [8] Mr. Justice Savage said:

[6] 74 Fed. 79 (1896).

[7] See cases cited in preceding section, especially Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904), and Steenerson v. Gt. Northeren Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897). But see Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683 (1898), and Brymer v. Butler Water Co., 179 Pa. St. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897).

[8] 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

"The plaintiff, in request 2, asks that the actual cost of the plant and property, together with proper allowances for depreciation, be declared to be legal and competent evidence upon the question of the present value of the same. We so hold. It is competent evidence, but it is not conclusive. It is not a controlling criterion of value, but it is evidence." [9]

The true inquiry is what is the present value of the plant, and the evidence should be directed to that issue. In the case of State v. Minneapolis & St. Louis Railroad [10] defendant's counsel showed what the road had cost up to the time of the inquiry. This included every item of expenditure from the start, such as cost of construction, repairs, equipment, additions, and all other items. But not a particle of proof was presented as to present value or cost of reproduction. The court held that the evidence did not properly show the value of the capital which was entitled to a return.

§ 356. Value returned for taxation not conclusive.

It is sometimes urged that the valuation placed upon the property of the company for taxation should establish the present value. While it is true that this furnishes some criterion, it certainly is open to show the common fact that assessments on the district in question are usually no more than a certain percentage of actual values. This was well put by Judge Morrow in Southern Pacific Railway Company v. Board of Railway commissioners.[11] It appeared that the railway in question had made a sworn return to the taxing authorities, but that was

[9] Citing Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 888 (1898); Cotting v. Kansas City Stockyards Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30 (1901); San Diego L. & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899); National Waterworks Co. v. Kansas City, 10 C. C. A. 653, 62 Fed. 853, 27 L. R. A. 827; Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; Westchester Turnpike v. Westchester County, 182 Pa. 40, 37 Atl. 905.

[10] 80 Minn. 191, 83 N. W. 60 (1900).

[11] 87 Fed. 22, B. & W. 322 (1898).

not held conclusive as the following extract from the opinion will show:

"The claim of the answer is that the Central Pacific Railroad Company and the complainant, and each of them, are estopped from claiming that said valuation so given in and to said board of equalization was not the true value of said property, and that the complainant is estopped from having its rates of charges fixed upon any other basis. It does not appear to me that the return of the complainant of a valuation of a part of its property to the board of equalization constitutes an estoppel as to the valuation of that property in an aggregate valuation of the whole property made up in part by the county assessors. Such a return is, however, evidence of the value of the roadway, roadbed, rails, and rolling stock, to be considered in arriving at the actual valuation of the whole property. It is not to be excluded from the case because it does not amount to an estoppel. It is evidence that may be introduced in support of the allegations of the answer denying the value now placed upon the property by the complainant for the purpose of fixing rates for charges." [12]

§ 357. Elements entering into the determination of present value.

In a recent case in Maine involving the valuation to be placed upon the property of a public service company, Mr. Justice Savage discussed the general problem with great acuteness:

"Much of the petitioner's argument is based upon the contention that when it is said that reasonable rates are to be calculated upon the fair value of the property used it means upon the actual money investment which has been reasonably expended. In this connection it should be noticed that to say that the reasonableness of rates depends upon the fair value of the property used, and that the fair value of the property used depends upon the rates which may be reasonably charged, seems to be arguing

[12] Accord, Louisville & N. Ry. v. Brown, 123 Fed. 946 (1903).

in a circle. If we should say that reasonableness of rates depended solely upon the value of the property, and that value of the property depended solely upon the rates which may be reasonably charged, such would be the case. But neither proposition is true. Other considerations than reasonableness of rates, as we have already observed in the Waterville case,[13] and as we shall have occasion to observe later herein, affect the fair value of the property. And the rates which it would be reasonable for the company to ask depend upon what would be a fair return, under the circumstances, upon the value of the property used—a question which we shall discuss later on. In determining what would be a fair return, undoubtedly the amount of money actually and wisely expended is a primary consideration. Actual cost bears upon reasonableness of rates, as well as upon the present value of the structure as such. It thus bears upon what is a fair return upon the investment, and so upon the value of the property. In estimating structure value prior cost is not the only criterion of present value, and present value is not what is to be ascertained. The present value may be affected by the rise and fall of prices of materials. If in such way the present value of the structure is greater than the cost, the company is entitled to the benefit of it. If less than the cost, the company must lose it. And the same factors should be considered in estimating the reasonableness of returns." [14]

TOPIC E—THE COST OF REPRODUCTION AS THE BASIS OF VALUE.

§ 358. The Minnesota rule.

According to the rule adopted in Minnesota the value on which a railroad is entitled to a fair return is the cost of reproducing the road in its present condition at present prices. If

[13] Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

[14] Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

extraordinary expenses were necessary in establishing the road, or if higher prices prevailed at the time it was built, these should not enter into consideration at all; the rule laid down in the case of Milwaukee Electric Railway and Light Company v. Milwaukee [1] is not followed. The leading case on this point in Minnesota in Steenerson v. Great Northern Railway.[2] The railway commission having fixed grain rates, the railway company appealed, and the question was finally determined in the Supreme Court of Minnesota. The facts as to the investment of capital in the railroad were as follows: Of the lines of railroad in question, 561 were built by several independent companies before 1879. In that year they were sold at auction on foreclosure for the sum of about four million dollars; they were then meregd into one new railway, the St. Paul, Minneapolis and Manitoba Railway, and the new company issued sixteen million dollars in bonds and fifteen million dollars in stock. In the next ten years it built about eight hundred miles additional of railway in Minnesota, and extended its main line to the Pacific Coast, greatly increasing its issues of stock and bonds. In 1890 it was leased to the Great Northern Railway, which guaranteed the principal and interest of the bonds. At the foreclosure sale of 1879 the 561 miles of main track then built were sold for a small part of their original cost, and a small part of what it would then cost to reproduce them, saying nothing of the large quantity of valuable lands included in the sale. In delivering the principal opinion in the case Mr. Justice Canty said:

"The railroad may have been constructed years ago, when iron rails cost $85 per ton, and everything else in proportion, or it may have been constructed yesterday, when steel rails cost but $16 per ton, and everything else nearly in proportion. Counsel for the railway company dwell much upon the original cost of the older portions of these lines of

1 87 Fed. 577, B. & W. 336 (1898).
2 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

road. If a railroad was built 30 years ago at a cost of $40,000 per mile, and another one equally as good was built within a year through the same territory at a cost of $12,000 per mile, on what principle should it be held that the old road is entitled to 3 1-3 times as much income as the new road? No guaranty was ever given by the state to the old road that the price of materials and the cost of construction would not decline, or that capital invested in railroads should not be subject to like vicissitudes as capital invested in other enterprises. Modern improvements and other causes have continued to reduce the cost of construction of all kinds of new plants, and to reduce the value of old plants, or render them wholly worthless, and the state did not guaranty that those causes should not in like manner affect the capital invested in railroads. Then the material question is not what the railroad cost originally, but what it would now cost to reproduce it."

§ 359. Methods of the Texas commission arriving at replacement value.

This rule of replacement has been acted upon by other commissions than that of Minnesota, but not with the same success. In a recent opinion in the Interstate Commerce Commission something is said about the practice of the Texas commission.[3]

"The valuations of the Texas Commission of 1895 were by no means a guess. They were made in great detail, with great pains and with an honest attempt at accuracy. The purpose of the valuation was to determine not properly the value of a particular railroad but the cost of reproducing it at that time. Each mile was taken by itself and each item which enters into the cost of constructing a railroad by itself in actual quantities as shown by the profiles of the various roads. The allowances for the different items were liberal. Nothing was, however, allowed for the seasoning of the roadbed so to speak, nor for the

[3] Rates from St. Louis to Texas Points, 11 I. C. C. Rep. 264 (1904).

franchise and good will of the railroad. The results arrived at did not perhaps express the value of the properties, but they did express, and with substantial fairness and accuracy, the cost of reproducing those properties at the time of the valuation."

§ 360. The rule held unreasonable by the federal courts.

The Minnesota rule having been applied by the Texas Railway Commission in fixing railroad rates in that state, the railroads filed in the federal court a bill for an injunction against the rates. The rule was held to be an improper and unreasonable one, and the exaction of the rates as fixed by the commission was restrained.[4] Circuit Judge McCormick said:

"It is therefore not only impracticable, but impossible to reproduce this road, in any just sense, or according to any fair definition of those terms. And a system of rates and charges that looks to a valuation fixed on so narrow a basis as that shown to have been adopted by the commission, and so fixed as to return only a fair profit upon that valuation, and which permits no account for betterments made necessary by the growth of trade, seems to me to come clearly within the provision of the Fourteenth Amendment to the Constitution of the United States, which forbids that a state shall deprive any person of property without due process of law, or deny any person within its jurisdiction the equal protection of the laws. It is true that railroad property may be so improvidently located, or so improvidently constructed and operated, that reasonable rates for carriage of freights and passengers will not produce any profit on the investment. It is also true that many railroads not improvidently located, and not improvidently constructed, and not improvidently operated may not be able, while charging reasonable rates for carriage of freight, to earn even the necessary running

[4] Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683, B. & W. 342 (1898).

expenses, including necessary repairs and replacements. And there are others, or may be others, thus constructed and conducted, which, while able to earn operating expenses, are not able to earn any appreciable amount of interest or dividends for a considerable time after the opening of their roads for business. This is true now of some of the roads, parties to these bills. At one time or another, and for longer or shorter times, it has been true, doubtless, of each of the roads that are parties to these bills. Promoters and proprietors of roads have looked to the future, as they had a right to do, and as they were induced to do by the solicitations of the various communities through which they run, and by various encouragements offered by the state. The commission, in estimating the value of these roads, say that they included interest on the money invested during the period of construction. This is somewhat vague, but the "period of construction" mentioned is probably limited to the time when each section of the road was opened to the public for business. And even if extended to the time when the road was completed to Denison and to Austin in 1873, nearly twenty years after its construction was begun at Houston, it would not cover all of the time, and possibly not nearly all of the time, in which the railroad company and its predecessors have lost interest on the investment. The estimate made on behalf of the railroad in this case of the cost to that company and to its predecessor company of the railroad property, and the business of that company as it exists to-day, may not be exactly accurate,—clearly is not exactly accurate; but it seems to me that it is not beyond the fair value of the property, as it is shown to have been built up and constituted, and to exist to-day as a going business concern, and that such rates of fare for the carriage of persons and property as are reasonable, considered with reference to the cost of the carriage and the value of the carriage to the one for whom the service is rendered, cannot be reduced by the force of state law to such a scale as would appropriate the value of this property in any measure to the use of the public without just compensa-

tion to the owners thereof, and would deprive the owners thereof of the equal protection of the law guaranteed by the Constitution of the United States, as cited."

§ 361. Explanation of the California decisions.

Two California decisions appear to hold that the cost of construction, as represented by the stocks and bonds outstanding, cannot be shown as bearing on the value of the plant.[5] The cases did not, however, go quite so far. They are considered and explained by Circuit Judge Morrow in the Federal Court in the Ninth Circuit.[6]

"The important question is the basis upon which just compensation is to be determined. It may be considered as established that it is the reasonable value of the property at the time it is being used for the public service, but how this value is to be ascertained and what elements are to be included in the estimate are still subjects of controversy. In the case of San Diego Water Co. v. San Diego [7] it was held that bonded indebtedness was to be disregarded, but this was said with reference to the findings in that case [namely, that the value was in fact a certain amount]. In Redlands L. & C. D. Water Company v. Redlands [8] it was held that . . . provision should not be made for the bonded or other indebtedness of the company, or of the interest thereon, but that the fair value of the property necessarily used in furnishing water was the basis upon which to determine the amount of revenue to be provided by the ordinance fixing rate, and that this basis should be the same whether the works were acquired or constructed by the company with its own resources or with money borrowed from others. It was further said that the amount of the capital stock paid into the

5 San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633; Redlands L. & C. D. Water Co. v. Redlands, 121 Cal. 365, 53 Pac. 843 (1898).

6 Spring Valley Waterworks v. San Francisco, 124 Fed. 574 (1903).

7 *Supra.*

8 *Supra.*

water company by its stockholders, and the amount of its bonded and floating indebtedness and the interest thereon, were immaterial factors in the question of reasonableness of rates. But in this case there was no averment in the complaint as to the value of the plant, and no showing before the court as to what this value was; and manifestly neither the amount of the capital stock nor the amount of the bonded indebtedness could supply this omission, and the conclusion which the court reached was that, as the value of the plant was the basis upon which the court was to determine the sufficiency of the compensation, it was essential to present that fact to the court before the water company was entitled to a judgment that the rates were unreasonable. But neither of these cases go to the extent of holding that in determining the value of the property of a corporation neither the capital stock nor bonded indebtedness can be considered. It is doubtless true that in many cases these elements may be excessive or fictitious, and represent speculative, rather than real and substantial, values. But there may be cases where both stock and bonds represent in the market a present actual value in the property of the corporation, and a value that could not be otherwise very well established. In such a case, what objection can there be to giving the evidence such consideration as, under all the circumstances it deserves? It seems to me there can be none."

TOPIC F—FRANCHISE AND GOOD-WILL, WHETHER ENTITLED TO BE CONSIDERED.

§ 362. Value of franchise not considered in estimating rates.

It must be clear that in estimating the capital upon which a public service company is entitled to a fair return the value of a franchise enjoyed by the company cannot be considered. The value of the franchise is itself based on the capacity of the company to earn profits; and it becomes greater when the earnings of the company are increased. If, therefore, a high rate of in-

come could be justified on account of the great value of the franchise, this fact would in turn enhance the value of the franchise itself and so justify a still higher charge; and there would be no limit to the legal charge of the company until the limit of charge which was in fact possible as a matter of business had been reached.[1] In one case[2] there is a dictum that the value of the franchise may be considered in arriving at the proper basis for just compensation; but it is submitted that the suggestion is unsound.

§ 363. Value of franchise as basis for taxation.

A different question arises when the value of the property of the company is estimated for purpose of taxation. The franchise is owned by the company, is of value, and would be paid for if the whole business were sold; and it should therefore be taxed.[3] This is, of course, a tax on the actual value of the franchise as it exists at any particular time; and the imposition of it is quite consistent with the value of the franchise, being subject to diminution by a diminished income as a result of legislation reducing rates.

§ 364. Value of franchise when the property is bought.

Whether when the plant of a public service company is taken by a city, by eminent domain or by contract, compensation is to be made for the franchises of the company is not entirely clear on the authorities. The question should of course be determined according to whether, in view of the purchase or taking, any value remains in the franchise. Although the company may be

[1] In Brunswick v. T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904), much the same idea is expressed by Mr. Justice Savage.

[2] Spring Valley Works v. San Francisco, 124 Fed. 574 (1903). It may well be that if a price is paid for the franchise to the governmental authorities granting the franchise that this sum must be accounted a part of the cost of the plant.

[3] Brisbane v. Brisbane Tramway Co., 9 Queensland L. J. 67 (1898).

compelled to submit to statutory rates which make no account of the existence of a franchise, the franchise may nevertheless be of some value. Even when the rates are so limited, the company is still permitted to receive a return on its capital which is greater than that on a government bond; the ownership of the plant may, therefore, have a certain value which the franchise gives. And if the franchise actually has a value, compensation for it should be made.

§ 365. Value of an exclusive franchise.

If a public service company has obtained from the public authorities an exclusive franchise for a term of years, which has been granted in such a way as to form a contract which the State cannot impair, the franchise has obviously a certain value, for the opportunity to make a fair rate of return in a business so safe as this is by reason of its monopoly in a public necessity is worth a certain sum in itself. But no more than this need really be paid even for such an exclusive franchise, no matter what its present profits may be, since the State may at any time reduce its rates to a fair return upon its actual investment. In one case[4] a substantial sum was allowed the sellers of a waterworks in a purchase by the city for the unexpired 37 years of a 50-year exclusive franchise, the court saying: "Another important question raised by the exceptions to the master's report is whether or not, in estimating the price to be paid by the town for the property to be conveyed, the exclusive right to maintain water pipes in the streets and highways for the remainder of the term of 50 years ought to be included. There is no question of the right of the town to grant such a franchise conditionally or unconditionally. Pub. Laws, c. 566, in force at the time the contract was made, gave such a power to any town. Neither is there any question that the waterworks have the power to sell

[4] Bristol v. Bristol & Warren Water Works, 23 R. I. 274, 49 Atl. 974 (1901).

and convey this franchise if it was given, for, when granted, it was given to George H. Norman, his heirs and assigns."

§ 366. **Value of a non-exclusive franchise.**

If, however, the company, in case it retained its plant, would be subjected to competition by the city, its franchise would cease to have any value. In Gloucester Water Supply Company v. Gloucester,[5] Mr. Justice Loring said:

" In determining the true construction of these provisions of § 16, it is important to bear in mind the purpose, which the Legislature had, in making the right of the city to supply itself with water conditional on its buying the company's property, in case the company elected to sell it to the city, and in providing that in ascertaining the 'fair value' of that property, it should not be enhanced 'on account of future earning capacity, or future good will, or on account of the franchise of said company.'

" It is also plain, so long as a water company has no competitor in supplying a town or city with water, it is practically in the enjoyment of an exclusive franchise, although its franchise is not legally an exclusive one. For that reason, the past earnings of this company were not evidence of the 'fair value' of this property. The earnings of a company which is in the enjoyment of what is practically an exclusive franchise are not a criterion of the 'fair value' of the property apart from an exclusive franchise. We are of opinion that the evidence of past earnings offered by the water company was properly excluded."[6]

§ 367. **Value of a practically exclusive franchise.**

When the franchise is practically exclusive, it presumably has a value, for which the company must be paid if the plant is taken by eminent domain or is bought under a clause in the

[5] 179 Mass. 365, 60 N. E. 977 (1901).

[6] Citing Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533 (1897).

charter.[7] The value of this franchise is greater or less according to the practical possibility of competition; it is greatest if the franchise is legally exclusive, and grows less as the likelihood of actual competition increases. This was well discussed by Mr. Justice Savage in Kennebec Water District v. Waterville.[8] "The Legislature may at any time, according to its own wisdom, grant to the municipalities within which this water system is situated franchises similar to the ones in question It may grant similar franchises to one or more corporations like the Waterville Water Company or the Maine Water Company.[9] It has granted similar franchises to this plaintiff, a municipal district, and has even authorized it to take away from the defendant water company all the franchises it needs within the district and Benton and Winslow.[10] But the defendants say that the Maine Water Company was "practically in the enjoyment of an exclusive franchise," because it had no competitor, although its franchise may not be legally an exclusive one.[11] And we say that the fact that the company was doing its business without competition may and should be considered by the appraisers when they are valuing the property of the defendant as a going concern. The fact is one of the characteristics of the going business, and may enhance its value. We are considering now only the legal situation of the company. There is a difference between a franchise which is practically exclusive and one which is actually exclusive, as there is a differ-

[7] Monongahela Nav. Co. v. U. S., 148 U. S. 312, 37 L. Ed. 463, 13 Sup. 622 (1892).

[8] 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

[9] Citing In re City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270 (1894); Long Island Water Supply Company v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165 (1897).

[10] Citing Kennebec Water District v. Waterville, 96 Me. 234, 52 Atl. 774 (1902).

[11] Citing Gloucester Water Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977 (1901).

ence between uncertainty and certainty. The distinction is vital in principle, and it may be important in fixing value. Of how much or how little importance it is can only be estimated by the appraisers after hearing the evidence. Again, the charters under which the company operates are subject to repeal by the legislature. The franchises are not perpetual and irrevocable. It may be that it is extremely unlikely that the Legislature would repeal the charters without providing for compensation in some way. The probabilities are fairly open to consideration. But the legal condition exists. It is a factor to be considered for what it is worth."[12]

§ 368. **Physicial adaptation to a growing business.**

In the case of National Waterworks Company v. Kansas City,[13] the suit was brought by the company to enforce the statutory obligation of the city to pay to the company "the fair and equitable value of the whole works." The method of ascertaining this value was discussed by Mr. Justice Brewer as follows: "The company insists that the test is to take the income or earnings, and capitalize them. The earnings pay 6 per cent. on four millions and a half. In other words, the company has produced a property which earns 6 per cent. on four millions and a half; and that, it is claimed, is the fair valuation of the property, 6 per cent. being ordinary interest. On the other hand, the city insists that the franchise has ceased, and that basing the value upon earnings is in effect valuing a franchise which no longer exists, and which the city is not to pay for; that the true way is to take the value of the pipe, the machinery, and real estate, put together into a waterworks system, as a complete structure, irrespective of any franchise,—irrespective of any thing which the property earns, or may earn in the future. We are not satisfied that either method, by itself, will show that which, under all the

[12] See, also, Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

[13] 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827 (1894).

circumstances, can be adjudged 'the fair and equitable value.' Capitalization of the earnings will not, because that implies a continuance of earnings, and a continuance of earnings rests upon a franchise to operate the waterworks. The original cost of the construction cannot control, for 'original cost' and 'present value' are not equivalent terms. Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is to-day. A completed system of water works, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city,—not only with a capacity to earn, but actually earning,—makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction."[14]

§ 369. Value as a going concern.

But in discovering present value, the value as a going concern is to be taken. In Gloucester Water Supply Company v. Gloucester, before cited,[15] Mr. Justice Loring said: "It is plain that the real, commercial, market value of the property of the water company is, or may be, in fact, greater than 'the cost of duplication, less depreciation, of the different features of the

[14] *Acc.* Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903); Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

[15] 179 Mass. 365, 60 N. E. 977, B. & W. 328 (1901).

physical plant.' Take, for example, a manufacturing plant: Suppose a manufacturing plant has been established for some ten years and is doing a good business and is sold as a going concern; it will sell for more on the market than a similar plant reproduced physically would sell for immediately on its completion, before it had acquired any business." [16]

On this point also Mr. Justice Savage well said in Kennebec Water District v. Waterville:[17] "The defendants, in request 9, ask that in determining the amount to be added to structure value, in consideration of the fact that the system is a going concern, the appraisers should consider, among other things, the present efficiency of the system, the length of time necessary to construct the same *de novo*, the time and cost needed after construction to develop such new system to the level of the present one in respect to business and income, and the added net incomes and profits, if any, which by its acquirement as such going concern, would accrue to a purchaser during the time required for such new construction, and for such development of business and income. We think this instruction should be given. These are all proper matters for consideration 'among other things.' They are not controlling. Their weight and value depend upon the varying circumstances of each particular case. Of course a plant, as such, already equipped for business, is worth more, if the business be a profitable one, than the mere cost of construction."

§ 370. **Value of "going business," whether entitled to a return.**

So far as the value of a "going business" is increased by the mere element of good will, it cannot demand a return from the rates charged. "It is proper here to say that in reaching these conclusions we have not attempted any estimate of the 'going value' of the waterworks as a distinct and severable item in the

[16] Citing National Waterworks Co. v. Kansas City, 62 Fed. 853, 10 C. C. A. 653, 27 U. S. App. 165, 27 L. R. A. 827 (1894).

[17] 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

calculation. By 'going value' we understand is meant that value which arises from having an established 'going' business. While not the exact equivalent of 'good will,' as applied to ordinary business, it is of a somewhat similar nature, and attaches to the business, rather than to the property employed in such business. The fact that the business is established is, of course, a material fact in ascertaining the value of the plant, and especially is this true where the property is being estimated for the purposes of sale or condemnation; but as a basis for estimating profits its significance is less apparent. The merchant who sells an established business may properly place a high value on the good will which he relinquishes to the buyer; but so long as he continues in the enjoyment of the business he has created he does not add the value of the good will to his capital stock in estimating the percentage of his annual profits."[18]

So far, however, as a going business involves the elements discussed in the last sections, its property is actually more valuable than the mere physical elements of which the plant is composed. The physical connections of its plant, the cost of fitting it for its purpose, the loss of interest on the investment during construction and until the plant is in complete and lucrative operation, all add an actual value to the plant and are properly included in the construction account and form part of the actual capital employed in the enterprise. To this effect is the language of Mr. Justice Savage in Kennebec Water District v. Waterville:[19] "A completed system of waterworks, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning in consequence thereof the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many build-

[18] Cedar Rapids Water Co. v. Cedar Rapids, 117 Iowa, 250, 91 N. W. 1081 (1902).

[19] 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

ings in the city,—not only with a capacity to earn, but actually earning,—makes it true that the 'fair and equitable value' is something in excess of the cost of reproduction.' "

§ 371. Consideration given to the entrepreneur.

The suggestion was thrown out in one opinion of the Interstate Commerce Commission[20] that a certain return upon the ability to conceive and execute the project might be taken into consideration. But in the light of the context, this appears to be no more than a fair return upon the investment. The quotation follows: " As already remarked, the Southern Railway is the consolidation of numerous independent railroad properties. It has become through this process of growth a great railroad system embracing to-day a mileage of more than 6,000 miles. In this operation properties which were worthless have been put together to form a valuable whole. The physical condition of those properties has been enormously improved. The facilities afforded to their patrons have been increased. The whole territory involved must be benefited by this amalgamation, so far as its physical service is concerned. This enterprise is a perfectly legitimate one. The men who have conceived and executed it are entitled to a fair return upon the money which has been actually invested in it. They are entitled, in addition, to a reasonable profit upon the ability to conceive and execute a project of this sort. They have no right to exact a return upon an extravagant capitalization, but whatever has honestly and in good faith and reasonably gone into this enterprise should be protected. On the other hand, the people in this territory are entitled to protection."[21]

[20] Danville v. Southern Ry., 8 I. C. C. Rep. 409.

[21] See, also, Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683, B. & W. 342 (1898).

CHAPTER XIII.

RATE OF RETURN.

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§ 381. **Elements in determining a fair return.**

What constitutes a fair rate of return may not be fixed by general rule but is largely a question of the particular case. It depends to a certain extent upon the character of the enterprise; in established businesses a lower rate should be expected than in new ventures. Again, it depends upon the nature of the security; upon bonds a lower rate of interest is secured than the percentage payable in dividends upon stocks. These are the principal considerations, but as the discussion advances it will be seen that there are other minor matters to be taken into account.

It will make some difference, also, in what manner the matter comes before the court for decision. If the question is whether a rate fixed by one in a public service is producing an unreasonably high rate of return, that is one thing. If the question is whether a rate fixed by public authority, either by the Legislature directly or by a commission acting in pursuance of legislative authority, is unreasonably low, that is another matter. It is obvious that there is all the difference of reasonable alternatives between these two aspects of the problem, that eight per cent. might not be too much return by a schedule fixed by the company in one case, while a reduction of a schedule by legislation so as not to produce more than six per cent. might not be outrageous in the other.

TOPIC A—ESTABLISHMENT OF THE DOCTRINE OF ADEQUATE RETURN.

§ 382. **Rates fixed must not produce a deficit.**

As will be seen, the earlier cases under the Fourteenth Amendment established that the State might regulate the rates of those engaged in public employment. The attention of the court was directed to showing that the power to regulate existed, and practically nothing was said about the limitations upon

that power.[1] And indeed the complainants did not adduce evidence that the rates fixed by the state were inadequate, but they denied simply that the rates could be regulated at all. But as soon as the power to regulate was once established the point was urged that the power had its limitations, and this the court conceded in very guarded language. For example, in the Railroad Commission cases[2] Chief Justice Waite said: "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to taking private property for public use, without just compensation, or without due process of law."

As late as the case of Reagan v. Farmers' Loan & Trust Company[3] this requisite was not stated unequivocally. In that case Mr. Justice Brewer said: "It is unnecessary to decide, and we do not wish to be understood as laying down an absolute rule that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money and property, if it be possible without prejudice to the rights of others."[4]

[1] Peik v. Chicago & N. W. R. R., 94 U. S. 155, 24 L. Ed. 94 (1876); Chicago, B. & Q. Ry. v. Iowa, 94 U. S. 164, 24 L. Ed. 97 (1876); Chicago, M. & St. P. Ry. v. Ackley, 94 U. S. 179, 24 L. Ed. 99 (1876); Tilley v. Savannah, F. & W. Ry., 5 Fed. 641 (1881).

[2] 116 U. S. 307, 29 L. Ed. 636 (1886).

[3] 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 180 (1894).

[4] The cases in the earlier period which required not much more than that the reduction of the rates under legislation should not work confiscation by producing a deficit in the operation of the company were:

UNITED STATES SUPREME COURT:

Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 72, B. & W. 71 (1876), affirming Munn v. People, 69 Ill. 80; Peik v. Chicago N. W. Ry., 94 U. S. 164, 24

§ 383. **Some return requisite.**

About fifteen years ago, therefore, the courts had gone no further than to enounce that some return must be left to owners of a railroad, but that any return, however small, was enough. In the much-quoted case of Chicago and Northwestern Railroad v. Dey,[5] Mr. Justice Brewer, then in the Circuit Court, said: "Counsel for complainant urge that the lowest rates the Legislature may establish must be such as will secure to the owners of the railroad property a profit on their investment at least equal to the lowest current rate of interest, say 3 per cent. Decisions of the Supreme Court seem to forbid such a limit to the power of the Legislature in respect to that which they apparently recognize as a right of the owners of the railroad property to some reward; and the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the Legislature is the

L. Ed. 97 (1876), affirming 19 Fed. 625; Chicago, B. & A. Ry. v. Iowa, 94 U. S. 164, 24 L. Ed. 94 (1876), affirming 5 Fed. 594; Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. 48 (1884), affirming 62 Cal. 69; Railroad Com. Cases, 116 U. S. 307, 29 L. Ed. 639 (1886), reversing Farmers' Loan & T. Co. v. Stone, 20 Fed. 270; Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028 (1888), affirming 49 Ark. 325; Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892), affirming s. c. 83 Mich. 592; Budd v. New York, 143 U. S. 517, 36 L. Ed. 384, 12 Sup. Ct. 468, B. & W. 79 (1891), affirming Budd v. People, 117 N. Y. 1, 22 N. E. 670 (1889).

FEDERAL COURTS:

Wells v. Oregon Ry. & Nav. Co., 15 Fed. 561 (1883); Tilley v. Savannah F. & W. R. R., 5 Fed. 641 (1881); Chicago, N. W. R. R. v. Dey, 35 Fed. 866, 1 L. R. A. 744 (1888); Chicago & P. M. & O. v. Becker, 35 Fed. 883 (1888).

STATE COURTS:

Arkansas—St. Louis & S. F. Ry. v. Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452 (1891).

Florida—Pensacola & A. R. R. v. Fla., 27 Fla. 403, 5 So. 833 (1889).

[5] 35 Fed. 866, 1 L. R. A. 744 (1888).

sole judge. The question is then one alone of policy. Whether by reducing the compensation to a minimum, railroad enterprises shall be discouraged, or enlarging, encouraged, is a matter for legislative, not judicial determination. Take a kindred matter. It is within the power of the Legislature to prescribe the rate of interest and to punish by severe penalties the exaction of larger than the legal rate. Suppose the Legislature of Iowa should reduce the legal rate of interest to 1 per cent., although such legislation would prevent capital from coming into the State, would the courts have power to declare the law unconstitutional? In like manner, the rulings of the Supreme Court imply that the Legislature may reduce railroad rates until only a minimum of compensation is secured to the owner. The rule, therefore, to be laid down is this: That where the proposed rates will give some compensation, however small, to the owners of the railroad property the courts have no power to interfere. Appeal must then be made to the Legislature and the people. But where the rates prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere and protect the companies from such rates." [6]

§ 384. Adequate return ought to be left.

The Dey case accurately stated the doctrine of the United States Supreme Court at the time it was decided, and for fully ten years it remained practically unquestioned. But in 1898, in the important case of Smyth v. Ames,[7] a disposition was shown to give more protection to the owners of the railroads. It was shown in that case that the regulation complained of might very probably leave some return above all proper charges. But this did not satisfy the court, Mr. Justice Harlan saying: "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On

[6] See cases cited in preceding section.

[7] 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898).

the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. But even upon this basis, and determining the probable effect of the Act of 1893 by ascertaining what could have been its effect if it had been in operation during the three years immediately preceding its passage, we perceive no ground on the record for reversing the decree of the Circuit Court. On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the Act of 1893, an actual loss in each of the years ending June 30, 1891, 1892 and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses, in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution. Under the evidence there is no ground for saying that the operating expenses of any of the companies were greater than necessary." [8]

[8] See, also:

UNITED STATES SUPREME COURT:

San Diego L. & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming 74 Fed. 79; San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702.

FEDERAL COURTS:

Cleveland Gas Light Co. v. Cleveland, 71 Fed. 610 (1891); Memphis Gas Light Co. v. New Memphis, 72 Fed. 952 (1896); Southern Pac. Ry. & Railroad Com., 78 Fed. 236, B. & W. 322 (1896); Northern Pac. Ry. v. Keyes, 91 Fed. 47 (1898); Kimball v. Cedar Rapids, 99 Fed. 130 (1900); Louisville & N. Ry. v. M'Chord, 103 Fed. 216 (1900); Haverhill Gas Light Co. v. Barker, 109 Fed. 694 (1901); Interstate Com. Com. v. Louisville N. R. R., 118 Fed. 613 (1902); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903); Palatka Water Works v. Palatka, 127 Fed. 161 (1903).

§ 385. Rates may be reduced provided reasonable return is left.

The present doctrine of the United States Supreme Court, as seen in Stanislaus County v. San Joaquin Canal and Irrigation Company,[9] is that rates of a public service company may be reduced any amount provided that a reasonable return is left to the owners upon the value of the property devoted to the public use. In that case an ordinance adopted by a board of supervisors fixing water rates was objected to because the result would work a reduction of its rates from eighteen to six per cent. The reply of Mr. Justice Peckham, in the Supreme Court of the United States, to this contention was: "It is not confiscation, nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of six per cent. upon the then value of the property actually used for the purpose of supplying water as provided by law, even though the company had prior thereto been allowed to fix rates that would secure to it one and one-half per cent. a month income upon the capital actually invested in the undertaking. If not hampered by an unalterable contract, providing that a certain compensation should always be received, we think that a law which reduces the compensation theretofore allowed to six per cent. upon the present value of the property used for the public is not unconstitutional. There is nothing in the nature of confiscation about it."[10]

STATE COURTS:

California—Spring Valley Water Works v. San Francisco, 82 Cal. 286, 22 Pac. 910 (1890).

Florida—Pensacola & A. R. R. v. Florida, 27 Fla. 403, 5 So. 833 (1899); State v. Seaboard Air Line (Fla.), 37 So. 314 (1904).

[9] 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 241 (1903).

[10] To the same effect are:

UNITED STATES SUPREME COURT:

Spring Valley Water Works v. Schottler, 110 U S. 347, 28 L. Ed. 173, 4 Sup. Ct. 48 (1884), affirming s. c. 62 Cal. 69; Railroad Com. Cases, 116 U. S. 307, 29 L. Ed. 636 (1886), reversing Farmers' Loan & T. Co. v.

§ 386. **Reasonableness of return a judicial question.**

In a late case this elementary rule is stated in most emphatic language. It appeared in the case of Palatka Water Works v. Palatka [11] that an ordinance of the city had reduced rates fifty per cent., and against the enforcement of these new rates an injunction was asked. In granting this Judge Shelby said: "We come to the averment in the bill that the regulation and reduction made by the new ordinance are unreasonable—so unreasonable as to destroy the value of the plaintiff's property. It is shown by the bill, as amended, that the complainant's plant cost about $100,000; that it is worth more than that sum; that its capital stock is $75,000; that its bonded indebtedness, bearing 6 per cent. interest, is $75,000; that the average cost of operating the plant is $4,732.86; that the average gross receipts for the past three years have been $11,824.20; and that its net income, if its charges are controlled by the ordinance of August 5, 1903, would be about $2,200. It is also alleged that the new ordinance fixes rates that are grossly unreasonable and unjust, and, if enforced, your orator will not be able to earn a

Stone, 20 Fed. 270; Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892), affirming s. c. 83 Mich. 592; Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1893); Covington & L. T. P. R. Co. v. Sanford, 164 U. S. 596, 41 L. Ed. 561, 17 Sup. Ct. 198 (1896), reversing s. c. 20 S. W. 1031; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming s. c. 64 Fed. 165; San Diego L. & T. Co v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702.

FEDERAL COURTS:

Memphis Gas Light Co. v. New Memphis, 72 Fed. 952 (1896); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903).

STATE COURTS:

Minnesota—State v. Minneapolis & St. L. Ry., 186 U. S. 257, affirming 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514 (1900).

Mississippi—Alabama & V. Ry. v. Railroad Com. (Miss.), 38 So. 356 (1905).

[11] 127 Fed. 161 (1903).

reasonable compensation for the services it is rendering and is compelled to render the city and its inhabitants, or a reasonable or any net revenue whatsoever upon its investment, nor would it be able to pay the taxes or interest on its bonded indebtedness. Conceding the legislative right to regulate the charges to be made by the complainant for water, such regulation must be within reasonable limits. It could not lawfully go to the extent of depriving the complainant of all income from its investment, and in effect confiscate its property. The power to regulate could not legally be used as the power to destroy. The question of the reasonableness of such regulations is one for judicial examination and determination.[12] But the judiciary ought not to interefere with rates established under legislative sanction, where the legislature has the right to act, unless they are plainly and palpably so unreasonable as to make their enforcement equivalent to depriving the complainant of reasonable returns on its investment; but judicial interference is proper when the case shows an attack upon the rights of property, under the guise of regulating, which will make the plaintiff's property valueless in his hands, by annulling or making inoperative existing contracts."[13]

§ 387. Fair rate of return.

According to present ideas therefore a fair rate of return must be left in the generality of cases; but if an adequate return is left the legislation is of course constitutional, although it be a reduction from the rates formerly in force. Two recent cases will show what degree of regulation is clearly permissible under these rules. In Cedar Rapids Company v. Cedar Rapids[14] Mr.

[12] Citing Covington Road Co. v Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560 (1896).

[13] Citing San Diego Land Co. v. National City, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154 (1899). See, also, Farmer's Loan & T. Co. v. No. Pacific Ry., 83 Fed. 249 (1897); Ball v. Rutland R. R., 93 Fed. 513 (1899).

[14] 118 Iowa, 234, 91 N. W. 1081 (1902).

Justice Weaver in dismissing a complaint that a reduction in rates of a water company made by public authority was unconstitutional because confiscatory, said: "The testimony, when taken as a whole, and considered in the light of all the proved and admitted circumstances, indicates the present fair value of the company's property to be somewhere from $400,000 to $500,000. The total earnings of the works, as charged upon plaintiff's books, for the year preceding the trial in the district court, were, in round, numbers, $59,000, subject, however, to some discounts for advance payments. Of this income about one-third is charged to the city and is not affected by the ordinance in controversy. The other two-thirds are collected from private consumers, and the charges for such service are reduced by the ordinance in varying proportions. Just the extent which this reduction will affect the company's earnings it is impossible to prove or predict with certainty, but we see no reason to believe that the total revenue, after making all due allowance for discounts, will be reduced below $50,000. The operating expenses charged for the year preceding the trial (being largely in excess of the average in its experience) were $23,000, or, including taxes, $28,000. On this basis the net earnings are 5 1-2 per cent. on a valuation of $400,000, or 4 2-5 per cent. on a valuation of $500,000, or 6 1-2 per cent. on the total amount of capital stock and bonds. Stated otherwise, this will enable the company to pay its interest charge of $7,500, make a dividend of 5 per cent. on its capital stock (including stock issued as dividends), and leave a margin of over $3,000 for contingencies. This estimate of earnings may be very materially reduced, or the estimate of the value of the plant be very materially increased, before the court will be justified in saying that the plaintiff's property is being exposed to destruction or confiscation by an unprofitable schedule of rates." [15]

[15] See accord:

UNITED STATES SUPREME COURT:

San Diego L. & T. Co. v National City, 174 U. S. 739, 43 L. Ed. 1154,

TOPIC B—INTEREST UPON BONDS.

§ 388. Interest upon outstanding bonds protected.

It was generally agreed from the very first that whatever might be the right to earn a dividend upon stock, the interest upon the outstanding bonds must be protected. Thus in Chicago and Northwestern Railway v. Dey, already cited,[1] Mr. Justice Brewer said: "Whatever individuals may do by private contract to modify existing rates of interest, the legislature has no compulsory power in the matter. While, by reducing the rates, the value of the stockholders' property may be reduced, in that less dividends are possible,—and that power of the legislature over property is conceded,—yet, if the rates are so reduced that no dividends are possible, and especially if they are such that the interest on the mortgage debt is not earned, then the enforcement of the rates means either confiscation, or compelling, in the language of the Supreme Court, the corporation to carry persons or property without reward."[2]

19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; Cotting v. Kansas City S. Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, B. & W. 316 (1901), reversing 82 Fed 850 (1897); San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 521 (1903), affirming s. c. 110 Fed. 702; Stanislaus Co. v. San Joaquin C. & I. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 245 (1903), reversing s. c. 113 Fed. 930.

FEDERAL COURTS:

Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683, B. & W. 342 (1898); Louisville & N. Ry v. McChord, 103 Fed. 216 (1900); Interstate Com. Com. v. Louisville N. R. R., 118 Fed. 613 (1902); Palatka Water Works v. Palatka, 127 Fed. 161 (1903).

STATE COURTS:

Maine—Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

Pennsylvania—Brymer v. Butler Water Co., 179 Penn. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897); Wilkes-Barre v. Spring Brook Water Co., 4 Lack. Leg. News (Pa.), 367 (1889).

[1] 35 Fed. 866, 1 L. R. A. 744 (1888).

[2] Interest upon bonded indebtedness was recognized as a fixed charge in:

§ 389. **The rate of return upon investments in general.**

Whatever standards there are in this matter are plainly external, and the court will take into account the rate of return upon investments prevailing in business generally. This is well put by Mr. Justice Canty in Steenerson v. Great Northern Rail-

UNITED STATES SUPREME COURT:

Union Pac. Ry. v. U. S., 99 U. S. 402, 25 L. Ed. 274 (1878), reversing 13 Ct. cl. 401; Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. 48, affirming 62 Cal. 69; Railroad Com. Cases, 116 U. S. 307, 29 L. Ed. 636 (1886), reversing Farmers' L. & T. Co. v. Stone, 20 Fed. 270; Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028 (1888), affirming 49 Ark. 325; Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892), affirming 83 Mich. 592; Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1893); Covington & L. T. R. Co. v. Sanford, 164 U. S. 596, 41 L. Ed. 561, 17 Sup. Ct. 198 (1896), reversing 20 S. W. 1031; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming 64 Fed. 165; Lake Shore & Mich. So. Ry. v. Smith, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. 565 (1899), reversing s. c. 114 Mich. 460, 72 N. W. 328; San Diego L. & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; Cotting v. Kansas City S. Y. Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, B. & W. 316 (1901), reversing 82 Fed. 850 (1897); Minneapolis & St. L. Ry. v. Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 1901 (1902), affirming 80 Minn. 191, 83 N. W. 60 (1900); San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702; Stanislaus C. v. San Joaquin C. & I. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 241 (1903), reversing s. c. 113 Fed. 930.

FEDERAL COURTS:

Chicago N. W. R. R. v. Dey, 35 Fed. 866 (1888); National Water Works Co. v. Kansas City, 62 Fed. 854, 10 C. C. A. 653, 27 U. S. App. 165 (1894); Cleveland Gas Light Co. v. Cleveland, 71 Fed. 610 (1891); Memphis Gas Light Co. v. New Memphis, 72 Fed. 952 (1896); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683 (1898); N. Pac. Ry. v. Keyes, 91 Fed. 47 (1898); Louisville & N. Ry. v. McChord, 103 Fed. 216 (1900); Chicago, M. & St. Paul Ry. v. Smith, 110 Fed. 473 (1901); Interstate Com. Com. v. Louisville & N. R. R., 118 Fed. 613 (1902); Louisville & N. Ry. v. Brown, 123 Fed. 946 (1903); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903); Palatka Water Works v. Palatka, 127 Fed. 161 (1903); Tift v. Southern Ry., 138 Fed. 753 (1905).

way company,[3] and his language is interesting as showing the weight of economic considerations in deciding these questions: "The rate of interest on money and the ordinary rates of income on capital invested have fallen enormously in the last few years. Everyone knows this, and the court which does not know it is certainly not fit to review the acts of a commission that should know it. Prof. Farnham of Yale, in Yale Review for August, 1895 (volume 4, pp. 199-201) gives statistics to prove that since 1873 rates of interest had up to that time fallen 52 per cent. They have fallen greatly since. The London Economist of July 3, 1897 (page 948) states that in Great Britain, within the last six months, large loans have been placed by the cities of Glasgow, Leeds, and Brighton at less than 2 1-2 per cent. interest per annum, and that the bonds of those cities, drawing that rate of interest, sold above par. Every court ought to know that there is now, and has been for some time, a glut of capital in the world's markets. For a long time the great wars of the world

STATE COURTS:

Arkansas—St. Louis & S. F. Ry. v. Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452 (1891).

Florida—State v. Seaboard Air Line (Fla.), 37 So. 658 (1904).

Illinois—Chicago v. Rogers Pk. Co., 214 Ill. 212, 73 N. E. 375 (1905).

Iowa—Cedar Rapids Co. v. Cedar Rapids, 118 Ia. 234, 91 N. W. 1081 (1902).

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

Michigan—Preston v. Detroit Water Com., 117 Mich. 589, 76 N. W. 92 (1898).

Minnesota—State v. Minneapolis & St. Louis Ry., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514 (1900).

Mississippi—Alabama & V. Ry. v. Railroad Comm. (Miss.), 38 So. 356 (1905).

Pennsylvania—Brymer v. Butler Water Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897).

But see Spring Valley W. W. v. San Francisco, 82 Cal. 286, 23 Pac. 910 (1890); Redlands L. & C. D. Water Co. v. Redlands, 121 Cal. 363, 53 Pac. 843 (1898); Steenerson v. Great N. Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

[3] 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

absorbed the principal portions of the world's surplus capital. This ended in 1871, with the Franco-Prussian war. For more than 20 years after that, enormous amounts of the world's surplus capital were absorbed in constructing railroads and other internal improvements. But this capital, unlike that consumed in the wars, earned enormous amounts of income, which were again added to the world's surplus capital seeking new investments. Modern improvements, resulting in increased production, and other causes, have, in progressive countries, been accumulating vast amounts of capital. The amount of such capital seeking investment has increased, while the demand for the same has fallen. And, where there are two dollars of idle capital to the one dollar of safe investment, the effect is the same as where there are two workingmen to one job. The amount of hire is reduced. The competition of capital with capital is continually cutting down the profits on investments and the rates of interest on money. This is no new theory."

§ 390. Rates at which governments can borrow no criterion.

What is said in the preceding paragraph must be accepted with some caution. The rates at which governmental bodies can borrow is obviously no criterion in itself. The standard is what the current rate of return is on securities of private companies conducting other businesses of similar character. This was pointed out by the Interstate Commerce Commission, very clearly if very briefly:[4] "In many countries the conduct of transportation by railways is undertaken by the government at public expense. The government of the United States could probably borrow what money would be needed to buy or build the railways of this country at from 2 1-2 to 3 per cent. Ought the public to be taxed for the service rendered beyond this rate of interest? Plainly, no such test ought to be applied. This government does not undertake that duty, nor does it guarantee any

[4] Re Advance Freight Rates, 9 I. C. C. Rep. 382 (1903).

rate of return upon the money invested. It would be clearly unjust to impose upon the private capital which performs this quasi-government function all the hazard without allowing it some participation in whatever profit may accure." [5]

§ 391. More than current rates of interest not secured to bondholders.

But it is disputed whether more than the current rate of interest upon enterprises of similar character can be secured to bondholders. In the case of Steenerson v. Great Northern Railway Company [6] the court answered the question in the negative, as this extract from the opinion of Mr. Justice Canty will show: "A railroad company is not entitled to a greater income during the acute stages of a panic because rates of interest are temporarily higher during such times. Permanent investments do not, as a general rule, bring higher rates

[5] To the same effect are:

UNITED STATES SUPREME COURT:

Cotting v. Kansas City S. Y. Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, B. & W. 316 (1901), reversing 82 Fed. 850 (1897); San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702; Stanislaus Co. v. San Joaquin C. & I. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 241 (1903), reversing s. c. 113 Fed. 930.

FEDERAL COURTS:

Cleveland Gas Light Co. v. Cleveland, 71 Fed. 610 (1891); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Chicago, M. & St. P. Ry. v. Smith, 110 Fed. 473 (1901); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903); Palatka Water Works v. Palatka, 127 Fed. 161 (1903).

STATE COURTS:

Iowa—Cedar Rapids Co. v. Cedar Rapids, 118 Ia. 234, 91 N. W. 1081 (1902).

Maine—Brunswick & F. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

Pennsylvania—Wilkes-Barre v. Spring Brook Water Co., 4 Lack. Leg. News (Pa.), 367 (1879).

[6] 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

of income during such times. It would rather seem from these quotations that 4 1-2 per cent. per annum was in 1894 a very reasonable rate of interest on such railroad bonds, and that 6 and 7 per cent. per annum was grossly excessive and unreasonable. If the railway company has made what turns out to be a bad bargain by issuing its bonds for 6 and 7 per cent. interest per annum, that should be its misfortune, and not the misfortune of the public. As before stated, neither the state nor the public has either directly or indirectly guaranteed that rates of interest and rates of income would not fall, to the detriment of the railway company." [7]

§ 392. Prevailing rate of interest allowed.

But the prevailing rate of interest upon bonds of like security is to be allowed to bondholders; and the court will inform itself as to that. Thus when the point was raised in Milwaukee Electric Railway Company v. Milwaukee [8] Judge Seaman in protecting the bondholders and others against undue reduction of fares by city ordinance, said: "The interest rate fixed in the bonds issued by the company is 5 per cent. The rate which prevails in this market, as shown by the uncontroverted testimony, is 6 per cent. for real estate mortgages and like securities. If the $5,000,000 basis be adopted, surely a better rate must be afforded for the risks of investment than can be obtained on securities of this class, in which there is no risk. Upon the basis of $7,000,000, which is more logical and just, the 5 per cent. named in the bonds is clearly not excessive, and should be accepted by a court of equity as the minimum of allowance; and, even upon the defendant's partial showing, the return would be

[7] When bond issues do not represent actual investment in the enterprise interest upon such bonds is not protected. Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1897), affirming 64 Fed. 165 (1898).

[8] 87 Fed. 577, B. & W. 342 (1898).

less than one-quarter per cent. above that, with the large margin for depreciation left out of account." [9]

TOPIC C—DIVIDENDS ON STOCK.

§ 393. Reasonable dividends allowed.

Within the last ten years the general principle has become established that there must be left to those who conduct a public enterprise some adequate return on their investment. This newer view was well put in one sentence in New Memphis Gas Light Company v. New Memphis,[1] thus: "The company has a right to such gross revenue from the sale of gas as will enable it to pay all legitimate operating expenses, pay interest on valid fixed charges, so far as bonds or securities represent an expenditure actually made in good faith, and also to pay a reasonable dividend on stock, so far as this represents an actual investment in the enterprise."

What then is reasonable dividend? In the first place, dividends upon stock where there are outstanding bonds ought be permitted to be somewhat larger than the interest upon the bonds. Since the bonds have a prior lien upon the assets, the risk to the holders of them is much less than to the holders of stock, and the

[9] The prevailing rate of interest is the test in the following cases:
UNITED STATES SUPREME COURT:
Stanislaus Co. v. San Joaquin C. & I. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 241 (1903), reversing s. c. 119 Fed. 930.
FEDERAL COURTS:
Interstate Com. Comm. v. Louisville & N. R. R., 118 Fed. 613 (1902); Louisville & N. Ry. v. Brown, 123 Fed. 946 (1903); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903); Palatka Water Works v. Palatka, 127 Fed. 161 (1903).
STATE COURTS:
Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).
Pennsylvania—Brymer v. Butler Water Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897); Wilkes-Barre v. Spring Brook Water Co., 4 Lack. Leg. News (Pa.), 367 (1899).

[1] 72 Fed. 952 (1896).

stockholders should therefore have a higher rate of return because of the risk of passing of dividends in bad times or of foreclosure in case of complete failure. But the question remains, what rate of return should be allowed upon stock, and this question of reasonable dividend depends chiefly upon the current rate of return to those who conduct other businesses of similar character.[2]

[2] In normal cases a public service company is protected in the payment of a fair dividend. See

UNITED STATES SUPREME COURT:

Union Pac. Ry. v. U. S., 99 U. S. 402, 25 L. Ed. 274 (1878), reversing 13 Ct. ct. 401; Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1893), reversing in part and affirming in part 51 Fed. 529; Covington & L. T. R. Co. v. Sanford, 164 U. S. 596, 41 L. Ed. 561, 17 Sup. Ct. 198 (1896), reversing s. c. 20 S. W. 1031; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming s. c. 64 Fed. 165; San Diego L. & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; Cotting v. Kansas City S. Y. Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, B. & W. 316 (1901), reversing 82 Fed. 850 (1897); Minneapolis & St. L. R. R. v. Minn., 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 901 (1902), affirming 80 Minn. 191, 83 N. W. 60 (1900); San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702; Stanislaus Co. v. San Joaquin C. & T. Co., 192 U. S. 201, 48 L. Ed. 406, Sup. Ct. (1903), reversing s. c. 113 Fed. 930.

FEDERAL COURTS:

Cleveland Gas Light Co. v. Cleveland, 71 Fed. 610 (1891); Memphis Gas Light Co. v. New Memphis, 72 Fed. 952 (1896); Southern Pac. Ry. v. Railroad Com., 78 Fed. 236 (1896); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577 (1898); Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683 (1898); Louisville & N. Ry. v. McChord, 103 Fed. 216 (1900); Interstate Com. Com. v. Louisville & N. R. A., 118 Fed. 613 (1902); Palatka Water Works v. Palatka, 127 Fed. 161 (1903).

STATE COURTS:

Florida—State v. Seaboard Air Line (Fla.), 37 So. 658 (1904).

Illinois—City of Chicago v. Rogers Pk. Co., 214 Ill. 212, 73 N. E. 375 (1905).

Iowa—Cedar Rapids Co. v. Cedar Rapids, 118 Ia. 234, 91 N. W. 1081 (1902).

Maine—Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

§ 394. Current rate of return.

What constitutes a fair rate of return must obviously be determined by some standard. The current rate of return upon enterprises of a similar character is submitted to be the true basis of fixing the percentage. This is said in the more discriminating cases which discuss the problem carefully. Thus in Spring Valley Waterworks v. San Francisco,[3] where an ordinance passed by a board of supervisors would reduce the annual net earnings below 4.40 per cent. on the value of the property necessarily employed in the service, or 3.30 per cent. on its stock after deducting proper charges, its enforcement was enjoined as fixing a rate so low as to be a taking of private property for public use without just compensation, Judge Merrow said: "The next question to be considered is, what will be a fair and reasonable income for the complainant to receive as a just compensation for the public use of its property? A number of bankers have testified as to the usual and customary net income from investments of $10,000,000 and upwards of capital in corporations of a quasi-public nature, where judiciously managed. The affidavits of four bankers of long experience and well-known character and standing fix the rate at not less than 7 per cent. per annum, and aver that a net income of less than 7 per cent. per annum from large investments would not be a reasonable or fair return. The affidavits of five bankers of like standing and character and similar experience fix the rate at not less than 6 per cent. per annum, and aver that a net income of less than 6 per cent. per annum for large investments would not be a rea-

Minnesota—State v. Minneapolis & St. L. R. R., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514 (1900).

Mississippi—Alabama & V. Ry. v. Railroad Co. (Miss.), 38 So. 356 (1905).

Pennsylvania—Brymer v. Butler Water Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260 (1897); Wilkes-Barre v. Spring Brook Water Co., 4 Lack. Leg. News (Pa.), 367 (1899).

[3] 124 Fed. 574 (1903).

sonable or fair return. The affidavit of one banker of large wealth and experience fixes the rate of net income from such investments at between 4 and 5 per cent. per annum. The weight of evidence is clearly in favor of a rate of not less than 6 per cent. per annum." [4]

§ 395. Usual business profit.

In any normal case the proprietor of a public service may therefore expect a dividend equal to the current rate of return in enterprises of similar character. It should be borne in mind, however, that public services have in general more assured permanence and less danger of ruinous competition than most private businesses. Therefore the cases will be rare where it would be justifiable to pay more than 10 per cent. dividends upon stock after deduction of all proper charges. Two illustrations of the way a court may treat the matter offhand will illustrate this. In Brymer v. Butler Water Company[5] the court said in reviewing the schedule of a water company, that it is entitled to a rate of return, if the property will earn it, not less than the legal rate of interest; a return of something over 6 per cent. was held

[4] Of the cases cited in the preceding section, see, especially:

UNITED STATES SUPREME COURT:

San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702; Stanislaus Co. v. San Joaquin C. & I. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 245 (1903), reversing 113 Fed. 930.

FEDERAL COURTS:

Cleveland Gas Light Co. v. Cleveland, 71 Fed. 610 (1891); Memphis Gas Light Co. v. New Memphis, 72 Fed. 952 (1896); Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683, B. & W. 342 (1898); Palatka Water Works v. Palatka, 127 Fed. 161 (1903).

STATE COURTS:

Iowa—Cedar Rapids Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081 (1902).

Pennsylvania—Brymer v. Butler Co., 179 Pa. 231, 36 Atl. 247, B. & W. 320 (1897).

[5] 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897).

not unreasonable therefore. In Grand Haven v. Grand Haven Water Works,[6] the court in fixing quantum meruit the value of hydrant service which the city had received from the water company estimated what the cost of a plant that would furnish adequate fire protection would be, and computed that the city was saved the interest and depreciation on that sum, $14,000, which at the rate of 8 per cent. would amount to $1,120 per year. In both of these instances it should be noticed the courts were really considering what rate of return it would be not unreasonable to allow the company to take, not to what rate of return it would be not unreasonable for the state to reduce the company.

§ 396. Rate of return dependent upon locality.

It is a part of the rule under discussion, that the rate of return which the company in question ought to be allowed to receive is that prevailing in the locality where the company is carrying on its business. This was said in Louisville & Nashville Railway Company v. Brown.[7] In holding a reduction of rates unjustifiable, Judge Pardee said: "At present, I do not think it necessary to consider exhaustively the question as to how much per cent. of net revenue, based on the actual value of the railroad and equipment, a railroad company is entitled to earn. I think it will be conceded that as long as the rates are reasonable, and do not unjustly discriminate, the company is entitled to earn some amount; and it seems reasonably clear to me that, if entitled to earn something under the above conditions, it is entitled to earn under the same conditions a compensatory amount equal, at least, to the usual and legal rate of interest in the locality where the railroad it situated. Judging by the business of the past 19 years, in connection with the showing made on this hearing as to present and future business, I conclude that there is no prospect in the immediate future that the net

[6] 119 Mich. 652, 78 N. W. 890 (1899).
[7] 123 Fed. 946 (1903).

earnings of the complainant's railroads in Florida will approach an amount at all equal to the interest on the value of the said railroads at the usual rate prevailing in Western Florida."[8]

§ 397. Paying dividends dependent upon commercial conditions.

To a certain extent the dividends which a railroad company can earn are dependent upon commercial conditions generally. When crops fail or when commercial crises come the general business of the common carrier inevitably falls off. Even if it should raise its rates very considerably it would be difficult for it to maintain its regular dividends and it is doubtful whether it ought to do so and increase thereby the general distress. This may be pressed too far, and perhaps the point is overstated in Steenerson v. Great Northern Railway,[9] where Mr. Justice Canty says: "It is not necessary here to determine just what rate of annual income on the cost of reproducing all of the road except the terminals is the least which the court would uphold before declaring the rates fixed by the commission confiscatory, but we are of the opinion that in such times as existed in 1894 an income of 5 per cent. per annum on such cost is certainly not unreasonably low or confiscatory, and that is as far as it is necessary to go in this case. More especially is this true since it appears from the evidence that in years prior to

[8] To the same effect are: San Diego L. & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; Cotting v. Kansas City S. Y. Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, B. & W. 316 (1901), reversing 82 Fed. 850 (1897); San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702; Stanislaus Co. v. San Joaquin C. & I. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 241 (1903), reversing s. c. 113 Fed. 930; Southern Pac. Ry. v. Railroad Com., 78 Fed. 236 (1896); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Brymer v. Butler Water Co., 179 Pa. 231, 36 Atl. 247, 36 L. R. A. 260, B. & W. 330 (1897); Wilkes-Barre v. Spring Brook Water Co., 4 Lack. Leg. News (Pa.), 367 (1899).

[9] 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

1894 this system of roads had produced some very large amounts of income, sufficient to make extraordinary improvements and betterments in the road, as well as ordinary repairs, to pay large dividends, and accumulate a cash surplus which in 1894 amounted to about $3,500,000. Besides, the Minnesota Eastern Railway Company, which is owned and controlled by the Great Northern Railway Company, had at that time a cash surplus of $1,000,000. The managers of railroads have no right to play with the public the game of 'heads we win, tails you lose.' 'When times are prosperous and dividends large, we win. When times are hard and business dull, the public must lose.'" [10]

§ 398. Recoupment in prosperous times.

It is desirable that there should be as few fluctuations as possible in the rates of public service companies, and in particular in the rates of the common carrier. At the same time the business of the carrier cannot but be affected by the state of commerce in the country at large. And if the carrier must suffer to a certain extent with others in bad times he ought be allowed to recoup himself to some extent in prosperous times. This is hinted in Metropolitan Trust Company v. Houston and Texas Central Railroad Company,[11] where Mr. Justice McCormick, in holding that the commission ought not to have reduced the rates of the railroad in the way that they did, said: "Promoters and proprietors of roads have looked to the future, as they had a right to do, and as they were induced to do by the solicitation of the various communities through which they run, and by various encouragements offered by the state." [12]

[10] The same idea is expressed in Matthews v. Board of Corp. Commrs., 106 Fed. 7 (1901).

[11] 90 Fed. 683, B. & W. 342 (1898).

[12] See, also, Brunswick & T. W. Water Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

§ 399. No right to raise rates in prosperous times.

In prosperous times business all over the country increases and consequently the amount of traffic carried by the railways increases. Since in the railroad business the law of increasing returns because of decreasing costs has surprising scope, this increase of traffic will produce greater profits at the rates formerly established. To a certain extent the carrier may enjoy these increased profits in prosperous times without the obligation to reduce rates, but the carrier may not increase rates because in prosperous times the shippers can afford to pay more. This contention was well handled by the Interstate Commerce Commission in one case.[13]

"The test of the reasonableness of a rate is not the amount of the profit in the business of a shipper or manufacturer, but whether the rate yields a reasonable compensation for the services rendered. If the prosperity of the manufacturer is to have a controlling influence, this would justify a higher rate on the traffic of the prosperous manufacturer than on that of one less prosperous. The right to participate in the prosperity of a shipper by raising rates is simply a license to the carrier to appropriate that prosperity, or in other words, to transfer the shipper's legitimate profit in his business from the shipper to the carrier." [14]

§ 400. Creating a fund for payment of uniform dividends.

A further suggestion has been made, which deserves consideration, that a railroad company, or any public service company, ought to be allowed to set aside in prosperous times a reasonable amount as a surplus out of which it may maintain its dividend

[13] Central Yellow Pine Asso. v. Illinois C. R. R., 10 I. C. C. Rep. 505 (1905).

[14] In Tift v. Southern Ry., 10 I. C. C. Rep. 548 (1905), the commission said: "The carriers necessarily and justly participate in the increased prosperity of their patrons in the resultant enlargement of their own business."

in less fortunate years. It is the practice of the strongest and best managed railroads and public service companies so to arrange matters by this process that they may always maintain their uniform dividend. This practice has the sanction of the Interstate Commerce Comission,[15] as the following will show: "But it may be urged that after paying its fixed charges, taxes and dividend out of its net income for the year 1902, it had left but a comparatively small amount. That year was one of prosperity, and it can hardly be expected that conditions will continue without interruption as favorable. Ought not a railway to be allowed to accumulate, in some form, a surplus during fat years which may tide over subsequent lean years? To this we would unhesitatingly answer in the affirmative. In times like the present a railroad company should be allowed to earn something more than a merely fair return upon the investment; but we also think that it clearly appears that the Michigan Central is doing this."

TOPIC D—RATE OF RETURN DEPENDENT UPON THE CHARACTER OF THE ENTERPRISE.

§ 401. Larger returns in risky enterprises.

It follows from what has just been said that in a risky enterprise a large return may be demanded. The principle that as large a return is permissible as is obtained in businesses of similar character covers the case. And the policy to induce people to undertake such services for the benefit of the public requires a larger return for a more risky enterprise.

In Brunswick Water District v. Maine Water Company [1] Mr. Justice Savage made the point very clearly indeed: "Those who engage in a public service cannot be put upon quite the same level as those who make mere investments. They are not like the depositors in a savings bank, whose right to draw out is lim-

[15] Re Advances in Freight Rates, 9 I. C. C. Rep. 382 (1903).
[1] 99 Me. 371, 59 Atl. 537 (1904).

ited to precisely what they have put in, with its earnings. They are, on the contrary, engaged in a business, with the ordinary incidents of a business, with some of the hazards and the hopes of a business. To be successful, they must be wise and prudent, thrifty and energetic. These virtues, if they have them, they impress upon the property, making it more valuable than it otherwise would have been. Is it to be said that they can have no return for skill and good management? We do not think so. They are entitled to charge reasonable rates. 'Reasonable' is a relative term, and what is reasonable depends upon many varying circumstances. An equivalent to the prevailing rate of interest might be a reasonable return, and it might not. It might be too high or it might be too low. It might be reasonable, owing to peculiar hazards or difficulties in one place to receive greater returns there than it would in another upon the same investment."[2]

[2] The following cases mention the character of the enterprise as a factor in determining the rate of return:

UNITED STATES SUPREME COURT:

Cotting v. Kansas City S. Y. Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, B. & W. 316 (1901), reversing 82 Fed. 850 (1897); Stanislaus Co. v. San Joaquin C. & I. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 241 (1903), reversing s. c. 113 Fed. 930.

FEDERAL COURTS:

Cleveland Gas Light Co. v. Cleveland, 71 Fed. 610 (1891); Milwaukee Elec. Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683, B. & W. 342 (1898); Louisville & N. Ry. v. Brown, 123 Fed. 946 (1903); Palatka Water Works v. Palatka, 127 Fed. 161 (1903).

STATE COURTS:

Kentucky—Troutman v. Smith, 105 Ky. 231, 48 S. W. 1684 (1899).

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 105, 54 Atl. 6, 60 L. R. A. 856 (1902); Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

Minnesota—Steenerson v. Great No. Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

Pennsylvania—Wilkes-Barre v. Spring Brook Water Co., 4 Lack. Leg. News (Pa.), 367 (1899).

§ 402. **Hazards of the business considered.**

The hazards of the business are therefore to be considered in determining what is a reasonable rate of return in the particular enterprise in question.

An excellent example of this problem is to be found in the case of Canada Southern Railway v. International Bridge Company.[3] It was shown in that case that the bridge company at its established charges was earning something like fifteen per cent. upon its investment. The opinion of Lord Chancellor Selbourne alluded to the peculiar risks of the enterprise rather by way of dictum than as the basis of his decision. He said: "It seems to their Lordships that it would be a very extraordinary thing indeed, unless the legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to fifteen per cent. Their Lordships can hardly characterize that argument as anything less than preposterous."

So in Troutman v. Smith,[4] where proceedings were instituted to compel a ferry to reduce its rates, Mr. Justice Burnam in de-

[3] L. R. 8 A. C. 723, B. & W. 315 (1883).
[4] 105 Ky. 231, 48 S. W. 1084 (1899).

ciding against the application pointed out the risks of the business. He said: "It is also apparent from the testimony that the proximity of this ferry to the Ohio river renders it more expensive and difficult to operate than an ordinary Kentucky river ferry. Under the statute, the appellant is compelled to execute a bond to pay all damages that may be sustained by any one by reason of negligence or misconduct in the management of the ferry, or from the insufficiency of any boat employed; and while it is apparent that there is some lack of proportion between the charges for foot passengers and vehicles,—which was probably the cause of the institution of this proceeding,—it seems to us, when we consider the amount of capital necessarily invested in the business, the cost of conducting it, and the risk and responsibility incident thereto, that a net revenue of $600 or $700 per annum is not an exorbitant compensation to appellant. A single accident might result in a liability that would exceed the income derived from the ferry for many years."

§ 403. Whether the return upon all property should be the same.

It is suggested in the case of Steenerson v. Great Northern Railway Company [5] that a difference is to be made in the rate of return to be allowed upon different kinds of property, in the particular case a lower rate upon the real estate constituting the terminals of the company. This can hardly be. All the property employed in the enterprise should be taken together and a uniform rate of return allowed upon it all by the general principles of public service law. However, as the point is a novel one, the opinion of Mr. Justice Canty is quoted. He said: "Let us now consider what in these times is a reasonable income on $14,000,000, invested in these terminals, and $30,000,000, invested in the rest of the road. The great value of the real estate covered by these terminals is given to it by anticipating the

[5] 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

future. Very little of this real estate is in or near to the business center of either city. Most of it is outlying city property and suburban property. It is safe to say that other real estate similarly situated, in the same portions of St. Paul and Minneapolis, does not, on an average, yield an income of 1 per cent. per annum above the taxes on the price or valuation at which it is held; and there is, as a general rule, no use to which such property can be put that will cause it to yield any greater income. In fact, it is doubtful if the same area of other property along and around these terminals could, on an average, by any use to which it could be put, be made to yield an annual income of 1 per cent. on one-third of the valuation placed on these terminals. Again, it is safe to say that in ordinary times, at least, capital could readily be found to buy such property at its market value for the purpose of renting it for 1 per cent. per annum above the taxes on it. In fact, millions have often been invested in such property without any prospect of any income at all from it for many years, and undoubtedly such will be the case again. Such real estate is valued, not on account of its present power to produce an annual income, but because it is believed that it will be still more valuable in the future. The owner of such property cannot expect to eat his loaf and still have it. He cannot expect that the property will pay a full-sized annual dividend, and at the same time double or treble in value every 10 or 20 years. He expects his dividends to accumulate in the form of increase in value." It may be that there is justification in disposing of this case in the way in which Mr. Justice Canty does; for if these great tracts of land are being held at inflated valuation full return upon that valuation ought not to be expected.[6]

[6] In a few cases the point has been raised that all of the property belonging to the public service company should not come in for returns upon the same basis. See Cotting v. Kansas City S. Y. Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, B. & W. 316 (1901), reversing 82 Fed. 850; San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming 110 Fed. 702; Capital City Gaslight Co. v. Des Moines,

§ 404. Rate of interest dependent upon the safety of the investment.

Just what rate of interest a public service company should be allowed to pay upon its bonded indebtedness it is difficult to determine by rule, since the circumstances will be different in different cases. Whatever it is obliged to pay to sell its bonds at par if the negotiations for the issue are conducted with good faith would be the test. And that would depend upon the stability of the business to the mind of the lenders. Public service bonds are sold on the exchanges from as low as a 3 per cent. basis to as high as a 12 per cent. basis, and doubtless will always continue to do so. The suggestion that some fixed standard should be taken, such as the rate paid upon United States, state, or even municipal bonds in the locality in question has no justice in it. That was said very plainly by Mr. Justice Edwards in Wilkes-Barre v. Spring Brook Water Co.,[7] when an application was made to him under the Pennsylvania statute to order a reduction of rates by a water company which was earning barely 5 per cent., allowing only 1 per cent. for depreciation: "Reference has been made to the interest paid on Wilkes-Barre city bonds and on large sums otherwise safely invested. Such investments are not by any means analogous to investments in water works. Good bonds such as Wilkes-Barre bonds remain intact. They are not liable to change or dimunition in principal. At a time certain the principal is to be paid to the investor to the last cent. If the rate paid on such investments shall determine the percentage of profit to be paid water companies there would be no inducement for anybody to invest money in works of a public nature. It would be much less wearisome to sit down twice a year and cut off coupons from bonds. Enterprise and industrial progress would be at a stand-

72 Fed. 829 (1896); Wilkes-Barre v. Spring Brook Water Co., 4 Lack. Leg. News (Pa.), 367 (1899).

74 Lack. Leg. News (Pa.), 367 (1899).

still. It must be remembered that those who embark in water companies place their property to a great extent in the hands of the public, as do all companies having the power of eminent domain. They must be always ready to supply the public demand, and must take the risk of any falling off in that demand. They cannot convert their property to any other use, however unprofitable the public use may have become. While they have a right to manage their property according to their own judgment, they are, nevertheless, subject to the supervisory powers of the courts. If the water for any reason becomes unwholesome, the courts will prevent the collection of the rates, until it becomes reasonably pure. Nor can the companies charge any rate they please, as if the water plant were a purely private matter. Consumers have a right to appeal to the courts, who have the power to decrease the charges if they are not just and equitable. It is evident, therefore, that the rate of interest paid on city bonds is not by any means conclusive as to the return a water company is entitled on its investments."[8]

§ 405. **Risk by reason of depreciated security not considered.**

A very complicated instance of this general problem came up in the case of Steenerson v. Great Northern Railway,[9] already much quoted. The problem and its solution are thus stated by Mr. Justice Canty in his own words: "An examination of the bond quotations above referred to will show that, where railroad bonds are amply secured, 4 or 4 1-2 per cent. per annum has been for the last few years rather a high rate of interest. But by reason of the decline in the cost of construction, and the de-

[8] Similar language is used in: Milwaukee Elec. Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1899); Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683, B. & W. 342 (1898); Louisville & N. N. Ry. v. Brown, 123 Fed. 946 (1903); Palatka Water Works v. Palatka, 127 Fed. 161 (1903); Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902); Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

[9] 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

cline in what is a reasonable rate of income, the bonds of but few railroads are now well secured. Twenty years ago the cost of railroad construction was at least twice as much as at the present time, and a reasonable rate of income on such cost was twice as much as at the present time. Therefore a reasonable amount of net income on the same mile of road (beyond the terminals) was about four times as much then as it is now. For these reasons a large amount of railroad bonds floated years ago, for the full cost of the roads, at high rates of interest, are now very poorly secured. And on the maturity of such bonds, or when an attempt is made to reorganize the road on foreclosure, it is found difficult to scale down the amount of indebtedness to a point where the road will, under present conditions, be sufficient security for bonds drawing a fair rate of interest. These things tend to make the present rates of interest on railroad securities unreasonably high. But should the losses caused by all of these economic changes be borne by the public, or by the owners of the railroad? There can be but one answer to this question. As we have repeatedly stated, neither the state nor the public have ever guarantied that railroads would always be worth the amount originally invested in them, or that what is a reasonable rate of income would not be less in the future than it was at the time of the investment, and have never guarantied, directly or indirectly, either the interest or principal of railroad bonds. These losses must be borne, not by the public, but by the owners of the railroad; and, as against the public, the holders of the bonds have no greater rights than the railroad company itself."

§ 406. General policy for allowing fair return.

According to modern views upon the constitutional guaranties an adequate return upon the true value of the property devoted to the public use by those who conduct a public service ought in all normal cases to be left; otherwise it is conceded that they are in effect deprived of their property without due process of law if their rates are so reduced by public authority as to leave

no such adequate return. And this is based upon sound public policy. It ought always be plain that those who invest their funds in some public employment are going to get a fair per cent. upon their investment; because unless they are assured of this they will employ their money elsewhere, and many enterprises necessary for the public convenience will not be undertaken, nor will existing plants be extended. It is, then, not only due consideration for the rights of others who have already invested their money in public service companies, but also an enlightened selfishness with a view to the future which dictates the policy that a reasonable return upon the value of the property used in the public service shall be held to be protected by the constitution.

CHAPTER XIV.

OPERATING EXPENSES.

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413. Net earnings in general.
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438. Dividends payable not classified as an annual charge.

TOPIC A—ANNUAL CHARGES.

§ 411. Cost of service to be earned before return on capital.

Before there can be any question of income on the capital employed, the necessary annual charges must be met by the rates; and first of all the actual cost of service furnished. This involves the payment of wages, and the purchase of current supplies. The general principle was concisely stated by Mr. Justice Brewer in Chicago and Northwestern Railway v. Dey:[1] "Compensation implies three things: Payment of cost of service, interest on bonds, and then some dividend. Cost of service implies skilled labor, the best appliances, keeping the road-bed and the cars and machinery and other appliances in perfect order and repair. The obligation of the carrier to the passenger and the shipper requires all these. They are not matters which the carriers can dispense with, or matters whose cost can by them be fixed. They may not employ poor engineers, whose wages would be low, but must employ competent engineers, and pay the price needed to obtain them. The same rule obtains as to engines, machinery, road-bed, etc., and it may be doubted whether even the legislature, with all its power, is competent to relieve railroad companies, whose means of transportation are attended with so much danger, from the full performance of this obligation to the public."

And to quote from the same judge in another case:[2] "It is obvious that the amount of gross receipts from any business does not of itself determine whether such business is profitable or not. The question of expenses incurred in producing those receipts must be always taken into account, and only by striking the balance between the two can it be determined that the business is profitable. The gross receipts may be large, but if the expenses are larger surely the business is not profitable.

[1] 35 Fed. 866, 1 L. R. A. 744, 2 Int. Com. Rep. 325 (1888).

[2] Brewer, J., in Chicago, M. & S. P. Ry. v. Tompkins, 176 U. S. 167, 44 L. Ed. 418, 20 Sup. Ct. 336 (1900).

It cannot be said that the rates which a legislature prescribes are reasonable if the railroad company charging only those rates finds the necessary expenses of carrying on its business greater than its receipts."[3]

[3] It is recognized in all cases that deal with the subject that except in the most extraordinary cases, a public service company must be permitted to earn enough to pay its operating expenses. See, upon the general principle:

UNITED STATES SUPREME COURT:

Union Pac. Ry. v. U. S., 99 U. S. 402, 25 L. Ed. 274 (1878), reversing 13 Ct. cl. 401; Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. 48, affirming 62 Cal. 69; Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028 (1888), affirming 49 Ark. 325; Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892), affirming s. c. 83 Mich. 592; Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1893); Covington & Lex. T. R. Co. v. Sanford, 164 U. S. 596, 41 L. Ed. 561, 17 Sup. Ct. 198 (1896), reversing s. c. 20 S. W. 1031; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming s. c. 64 Fed. 165; Lake Shore & M. S. Ry. v. Smith, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. 365 (1899), reversing 114 Mich. 460, 72 N. W. 328; San Diego L. & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming s. c. 74 Fed. 79; Chicago & M. & St. P. v. Tompkins, 176 U. S. 167, 44 L. Ed. 418, 20 Sup. Ct. 336 (1900), affirming s. c. 90 Fed. 363 (1898); Cotting v. Kansas City S. Y. Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, B. & W. 316 (1901), reversing 82 Fed. 850 (1897); Minneapolis & St. Louis R. R. v. Minn., 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 901 (1902), affirming 80 Minn. 191, 83 N. W. 60. San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903), affirming s. c. 110 Fed. 702; Stanislaus Co. v. San Joaquin C. & I. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 241 (1903), reversing s. c. 113 Fed. 930.

FEDERAL COURTS:

Chicago N. W. R. R. v. Dey, 35 Fed. 866 (1888); Chicago W. P. M. & I. v. Becker, 35 Fed. 883 (1888); National Water Works Co. v. Kansas City, 62 Fed. 853, 10 C. C. A. 653, 27 U. S. App. 165 (1894); Memphis Gas Light Co. v. New Memphis, 72 Fed. 952 (1896); Southern Pac. Ry. v. Railroad Comm., 78 Fed. 236, B. & W. 322 (1896); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Metropolitan T. Co. v. Houston & T. C. R. R., 90 Fed. 683, B. & W. 342 (1898); No. Pac. Ry. v. Keyes, 91 Fed. 47 (1898); Chicago, M. & St. P. Ry. v. Smith, 110 Fed. 473 (1901); Interstate Com. Comm. v. Louisville & N. R. R., 118 Fed. 613

§ 412. **Items in cost of performing service.**

In Chicago, St. Paul, Minneapolis and Omaha Railway v. Becker[4] the railroad and warehouse commission of Minnesota had made an order fixing a rate for switching the cars of other railroads in its yard in Minneapolis. The railroad brought this bill for an injunction against the enforcement of the rate, on the ground that the rate established by the commission was not remunerative. The injunction was granted. Mr. Justice Brewer said: "It is not within the power of the State, directly or indirectly, to put in force a schedule of rates, when the rates prescribed therein will not pay the cost of service. In this case the defendant took no testimony, and the complainant's testimony shows that the actual cost of the service, that is, wages of employes, rent of engines, keeping the track in repair, exceeds per car by fourteen cents the amount allowed in the schedule as compensation. In other words, it costs complainant one dollar

(1902); Louisville & N. Ry. v. Brown, 123 Fed. 946 (1903); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903); Palatka Water Works v. Palatka, 127 Fed. 161 (1903); Tift v. So. Ry., 138 Fed. 753 (1905).

STATE COURTS:

Arkansas—St. Louis & S. F. Ry. v. Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452 (1891).

California—Spring Valley Water Works v. San Francisco, 82 Cal. 686, 23 Pac. 910 (1890).

Florida—State v. Atl. Coast Line et al. (Fla.), 37 So. 652 (1904).

Iowa—Cedar Rapids Co. v. Cedar Rapids, 118 Ia. 234, 91 N. W. 1081 (1902).

Kentucky—Troutman v. Smith, 105 Ky. 231, 48 S. W. 1084 (1899).

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 56 (1902).

Minnesota—State v. Minneapolis & St. L. R. R., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514 (1900).

New York—Gould v. Edison Electric Co., 29 Misc. (N. Y.) 241, 60 N. Y. Supp. 559 (1899).

Pennsylvania—Brymer v. Butler Water Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897).

[4] 35 Fed. 883 (1888).

and fourteen cents per car to do the work, and the defendants propose to allow it to charge only one dollar. 'The State cannot require a railroad corporation to carry persons or property without reward.'"[5]

The question was involved in a decision by the English Railway Commission. Upon a complaint under section 1 of the Railway and Canal Traffic Act, 1854, that a railway company had, since the 1st of January, 1893, unreasonably increased their rates for coal for shipment from the applicants' collieries to the Tyne Dock and Sunderland, by an addition of 5d. to the rate per ton, it was held by the Railway Commission that it was not unreasonable that the increase complained of should have been made, the railway company having proved that the cost of working the applicants' traffic had increased by increased cost for locomotive power, owing chiefly to the shortening of the hours of labor, increased wages, greater number of wagons having been allotted to the applicants, owing to the colliery owners requiring their traffic to be conducted with greater despatch, and increased rates and taxes.[6]

§ 413. Net earnings in general.

The proper determination of net earnings is by no means the simple problem it might seem. It is obvious that certain expenditures should be accounted for as annual charges, but as to other outlays, it is difficult to state rules. The character of this problem in general was excellently stated by the Interstate Commerce Commission in one proceeding[7] thus:

"The item of conducting transportation cannot be much modified. Whenever a train moves so much coal must be used and so many men employed at the time of the movement. With maintenance of way and equipment this is not so. A certain amount

[5] Citing from Railroad Commission Cases, 116 U. S. 331, 6 Sup. Ct. 344, 29 L. Ed. 365 (1886).

[6] Charlaw & S. C. Co. v. North Eastern Ry., 9 Ry. & Can. T. Cas. 140.

[7] Rates from St. Louis to Texas Points, 11 I. C. C. Rep. 238 (1905).

must be expended to keep the road-bed and other permanent structures and the rolling stock in a going condition, but a certain other amount, although necessary to keep the property good in the long run, may be laid out sooner or later according to the will of the management. For example, rails must be relaid but the time of relaying can usually be varied for a considerable period. So in the renewal of a bridge or a culvert there is a leeway of years usually. A car or an engine can be used after good economy would require its abandonment. The building of a station can be postponed almost indefinitely. From these considerations it results that the management can without taking from or adding to the items which are actually needed to keep the property good vary for a particular year or even for a series of years by several hundred dollars per mile the cost of operation and thereby the net results.

"In addition to this the amount charged to maintenance may be greatly varied by the manner in which the accounts are kept. A new car is purchased in the place of an old one. It is largely more efficient and more expensive. What part of it shall be charged to maintenance and what part to permanent improvement? So of the replacement of rails, bridges, culverts, depots and whatever enters into the construction and equipment of a railroad. Some railroads carefully separate what is properly maintenance from what is strictly an addition; others are liberal in the making of these distinctions, charging more to maintenance and renewal and less to betterment, while still others charge all improvements against operating expenses. The general tendency in all parts of the country is to charge more to operation than formerly."

§ 414. Expense of equipment and maintenance.

As the public service company is obliged to provide a sufficient equipment for the proper accommodation of the public, and to keep all its appliances and premises in good condition, the cost of maintaining the equipment is of course to be repaid from the

rates. Thus, in the case of a ferry, the court in passing on the reasonableness of a rate considered that the owner of the ferry "is compelled, in the operation of the ferry, to keep for the accommodation of the public two large boats for the transportation of vehicles, a waiting boat, a large flat outside waiting boat, for convenience in getting in and out of skiffs, four skiffs, a large reflecting lamp, that throws light across the river; and that she owns, and is compelled to keep in repair and free from mud, the approaches to the ferry on both sides, and employ regularly two men, and frequently three or four additional hands to perform the necessary work."[8]

§ 415. Cost of rolling stock.

The expense from use of rolling stock constitutes one of the heavy items in the operating charges of a railroad. As has been pointed out, this is a charge which tends to increase rather than diminish. In a recent proceeding before the Interstate Commerce Commission the ground was gone over in a thorough manner, as the following extract will show:[9] "One of the most important items which enter into the expense of railroad operation is the cost of equipment. For the purpose of arriving at some satisfactory opinion on this subject the Commission examined in this proceeding the first vice-president of the American Car and Foundry Company and in another similar proceeding the general manager of the construction department of the Pullman Company. The testimony of these gentlemen agrees.

"The cost of building a car also of necessity varies with the changes in cost of materials and labor which have been about the same in the car shop as in other railroad operations. What should be especially noted, and what largely accounts for the apparent great increase in price is the fact that the car of to-day differs radically from the car of ten or twelve years ago. The

[8] Troutman v. Smith, 105 Ky. 231, 48 S. W. 1084 (1899).

[9] Rates from St. Louis to Texas Points, 11 I. C. C. Rep. 238 (1905).

capacity of the modern car is much greater. The coal car of 1892, which sold for $600, had a capacity of 25 or 30 tons. The coal car of 1902, which sold for $1,100, was a steel car with a capacity of 50 tons. This increase in capacity has been secured without a corresponding increase in the weight of the car. Taking the increase in capacity at 100 it was said that the corresponding increase in weight would be approximately 75. This adds, as will be more fully explained later, to the efficiency of the car by increasing the amount of paying freight in comparison with the dead weight. There are also many improvements in the construction of cars which add to the ease and convenience of operation but which also add something to the cost of the car."

"The evidence as to the cost of locomotives is less complete than in case of cars. Engines, like cars, are of much greater capacity than formerly, and they are also equipped with many improved devices which are supposed to add to the value in actual operation. In units of tractive power, the difference is less when given by the engine. Even when so measured we are inclined to think that they were distinctly higher in 1902 than in 1892. The ownership of the various locomotive works of the United States has been so adjusted within the last few years that 'suicidal competition' no longer exists; and this fact is easily observed in the price which railways are compelled to pay."

§ 416. Cost of supplies.

The articles which a railroad company has occasion to buy are very numerous. Some of these are extensively used, others only in limited quantity. Evidently no general average can be constructed which is reliable without knowing the quantity which is used of each article. "An advance in the price of coal would be of vital consequence to a railway and would be in no wise offset by a corresponding decline in feather dusters." These are general questions considered in passing upon the reasonableness of rates. The prices of almost all supplies used in railway construction and operation have advanced phenomenally in recent years.

"It seems unnecessary to enter into a consideration of this aspect of the case in much detail, but this general observation may be made: Between May, 1900, and May, 1902, some articles had declined, others advanced. Steel rails, for example, had fallen in price, ties and other lumber had increased. On the whole it fairly appears that there was between those two dates a distinct increase, though not great, in the average cost of railway material."[10]

§ 417. Salaries of officials.

The reasonable salaries of officials must, of course, be paid, as part of the annual charges; but these salaries must not be fixed at an extravagant amount. If a group of stockholders who controlled a majority of the stock could vote themselves enormous salaries and deduct the amount from the receipts of the company before making a return to capital, the highest possible rates might be justified, and the rights of the public be ignored. This question was considered, and well discussed, by Mr. Justice Brewer in Chicago and Grand Trunk Railway v. Wellman:[11] "It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries,—fifty to one hundred thousand dollars to the president, and in like proportions to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stock-

[10] Re Advances in Freight Rates, 9 I. C. C. Rep. 382 (1902).
[11] 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892).

holders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this: that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.' We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

§ 418. Estimating labor cost.

Estimating labor cost is by no means so simple a process as it seems. In one important case before the Interstate Commerce Commission[12] recently this matter was examined rather elaborately, as the railways affected claimed the right to advance rates by reason, for one cause, of the increase in wages. On that point the Commission said in part: "The railroads insist that this advance in the per diem wages does not represent the actual increase in the cost of the labor itself for the reason that owing to the regulations and requirements of the various labor organizations that labor is less efficient. For illustration, a station agent formerly did the work of a telegraph operator whereas to-day two persons must be employed. Without expressing any opinion as to the reasonableness of these regulations and requirements we are inclined to think that the claim is well taken and that there has been for various reasons a loss, as compared with ten or twelve years ago, in the quantity of work which a day's labor means.

[12] Rates from St. Louis to Texas Points, 11 I. C. C. Rep. 238, 251.

"Upon the other hand it must be carefully observed that owing to the introduction of certain economies in railroad operation a given quantity of work produces a much greater result. These different economies come mostly to the same end, the handling of a greater amount of paying freight in a train."

§ 419. Loans.

It is obvious that a loan made by a company during the year cannot be charged as an annual expense. In Southern Pacific Co. v. Railroad Commissioners [13] that question actually came up for decision. It appeared that the Southern Pacific Company, as lessee, had entered into an elaborate lease with the Oregon & California Company as lessor, by the terms of which the net earnings received by the lessee should be applied to pay the interest on the bonded indebtedness of the lessor with a proviso that if there should not be a sufficiency of net earnings upon the line to pay this interest the Southern Pacific Company might pay the same on account of the Oregon & California Company and charge the payment to it, being entitled to reimburse itself from future net earnings with six per cent. interest until paid. The Southern Pacific Company claimed that a payment which it had made on this account should be put in as a current expenditure in determining whether the rates fixed by the California Commission left it a reasonable return above proper expenses. But the court held otherwise; on this point Judge McKenna said: "Was the payment of the interest a loss to the Southern Pacific Company? Clearly not. It is secured to it, and is to be reimbursed to it, and is charged in the report as a 'balance deficit payable by Oregon & California Railroad Company.' Clearly, again, if it had not been paid, it could not be claimed as a loss. If paid, and to be reimbursed and secured, it cannot be claimed as a loss, if the debtor or the security be good. I cannot assume now that the debtor or the

[13] 78 Fed. 236, B. & W. 332 (1896).

security will not be good. It may be, of course, that it will not be good, but I can only deal with present conditions, or, at any rate, with those likely to occur within a reasonable period of time. That, under the lease, the payment of the deficit is not a charge on the Southern Pacific Company, is not only evident from its terms, but evident from the allegations of the bill."

§ 420. Taxes.

Taxes for the year are obviously a proper annual charge. Overdue taxes for past years paid during the year can hardly, however, be properly regarded as an annual charge.[14] Upon the policy for the State to pursue in taxing public service companies in general and railroads in particular, there is and may be much difference of opinion. Such companies should, of course, be taxed upon their tangible property at its locus, and this is generally done. But upon the question of whether there should be a high franchise tax opinion differs, although it is now recognized that such taxes are constitutional enough. It may be pointed out, however, that if too heavy a franchise tax is levied upon a railroad company, it is bound in the end to react upon the rates which the railroad will charge the public, as the payments made for taxation requirements are obviously annual charges.

This matter was discussed by the Interstate Commerce Commission in one proceeding.[15] "Several of the carriers stated that there was a tendency on the part of States and municipalities to increase the taxes levied upon railroads, and that this imposes an additional burden. Railroad property, like every other species of property, should bear its just burden of taxation. If the property has been once taxed, the stock which represents that property ought not to be taxed a second time; and when it is, the tax on the property is in the nature of an operating expense."

[14] Southern Pacific Co. v. Railroad Comrs., 78 Fed. 236, 272 (1896).
[15] Re Advances in Freight Rates, 9 I. C. C. Rep. 382 (1902).

§ 421. Losses by accident.

A certain amount of loss by accident is inseparable from the conduct of any business, and this is particularly true of a business having so many unavoidable dangers as that of railroad operation. In so far as these losses are without fault of anyone concerned the sums paid to make reparation for them may obviously be charged as an expense of operation. But more than this, it seems, must be conceded; a certain amount of negligence by employes cannot be avoided, and these losses also seem inseparable from the conduct of the business. The only losses which the railroad company may not properly charge against the public, therefore, are those which result from its own reckless management, or its wilful failure to provide adequate facilities.

These points were excellently made in a recent ruling by the Interstate Commerce Commission.[16] "The defendant states that excessive damages are claimed by Texas shippers with respect to the shipment of live stock; it apparently insists that these damages are unjust and that it is compelled to recoup itself by an advance in the rate. This Commission can hardly find that a judgment rendered in due course of judicial procedure is unjust or excessive. Nor can we assume that this defendant has been coerced into payment of unreasonable or unjust damages by the bringing of such suits. The fact, however, that claims of that kind are made in large amounts, that such claims are often compromised by the carriers, that when not compromised they result in large verdicts and that as a consequence the carrier is obliged to pay large sums for damage to live stock in transit is undoubtedly proper to be shown. It is an incident in the transportation of that commodity, which may properly be taken into account by the railway in establishing its tariff. If for any reason these claims for damages have become

[16] New Orleans Live Stock Exchange v. Texas & P. Ry., 10 I. C. C. Rep. 331 (1904).

more frequent than they were formerly, without fault upon the part of the railway, that might be a reason for increasing the rate. It should be carefully observed, however, that the defendant ought not by this means to escape from its own negligence. The testimony in this case showed that from three to six days were usually consumed in transporting live stock from Fort Worth to New Orleans, a distance of 500 miles. Apparently a much less time ought to suffice. The defendant itself admitted that over three days ought not to be consumed. If six days are used and if the stock is in fact injured by this delay, it is difficult to see why damages ought not to be claimed and collected. The consequences of such neglect should fall upon the owners of this property, not the public. To the extent that loss or damage is peculiar to a particular kind of traffic that fact may be properly recognized in the rate, but charges of transportation should not be advanced to make good the negligence of the carrier itself."

§ 422. Expenditures to get business.

The company can no doubt expend a reasonable amount in advertising, and charge it to operating expenses. But great sums spent to secure business in competition with other companies cannot be so charged. Reasonable advertising, which is merely informing the customer of the benefits offered him by the company, is for the benefit of the customer; but money spent in efforts by one company to secure certain business in preference to another company benefits the company only, not the customer, and it is not just that the customer should be forced to pay it. So in the case of Pannell v. Louisville Tobacco Warehouse Company,[17] a case involving the regulation of rates of tobacco warehouses, Mr. Justice Hobson said: "About 175,000 hogsheads are sold annually by appellees. But a short time is taken to sell a hogshead, and it is hard to escape

[17] 113 Ky. 630, 68 S. W. 662, 23 Ky. L. Rep. 2423 (1902).

the conviction, from the proof, that there is a very bitter rivalry between them to secure trade, and that this rivalry is somewhat promoted by the scale of fees that are charged under the rules. In other words, the rules allow a liberal compensation, and it is a matter of importance to the warehouse to secure the trade of a customer, and in order to secure trade the houses expend large amounts in the country. If the business was not remunerative, they could not afford to expend as much as is shown by the proof in securing it, and we do not think it can be maintained that a scale of fees which is so large as to justify the warehouseman in expending large amounts to secure trade might not be properly reduced. For we know that the larger the fee, the more the warehouseman can afford to pay out to get the trade; and it is not the policy of the law that the warehousemen should be allowed to charge a large fee against the shipper, in order that he may be able to spend a portion of it in securing the trade. To illustrate: If the fees were so large that the warehousemen could give half of them to get the business, it is manifest that this would lead to practices that ought not to be encouraged, and would be a hardship on the tobacco raiser, which the statute was designed to prevent."

§ 423. Unreasonable expenditures.

The Interstate Commerce Commission has had occasion several times to animadvert upon the practices of the railways in paying extraordinary sums to get business. These must obviously be tested like other operating expenses of the company, and if found to be unduly high without justifiable reason they should be disallowed.

Thus in an early investigation by the Commission it reported:[18] "Another cause is found in the active competition for traffic, under the stress of which a vast number of soliciting agents are employed, whose offices are found not only on the

[18] Re Underbilling, 1 Int. Com. Rep. 813, 1 I. C. C. Rep. 633 (1888).

corners of the most expensive streets of every city, but in the rural communities as well; and who represent, both in their fixed establishments and in their movement up and down the land, not only the carriers directly, but also various so-called "lines"—red, white, or blue, as the case may be; whose only interest is to obtain traffic; who have little responsibility of their own or to their ultimate employers; and whose object in life is necessarily to make a record of success in securing business which shall warrant the continuance of their employment and of their pay. All this gilded advertisement and persistent solicitation in the end is paid for by the public. The business exists and the public service of transportation must be done, whether or not any agent intervenes to help along the contract. Whatever arrangements and considerations are devised for the purpose of securing a shipment to a given line are necessarily at the expense and to the prejudice of some other shipper."

§ 424. Improvident expenditures.

And in a later case before it where it was shown that large commissions—20 per cent. of the gross receipts in one case—were being given by certain railroads for the purpose of developing their milk traffic, the Commission said squarely that such expenditures could not be charged against the shippers in making up the rates. To quote the language used: "The Lackawanna and Lehigh Valley are parties to agreements entered into mainly for the purpose of developing their milk traffic, and under which compensation is afforded to the other contracting parties equal to a considerable share of the gross receipts from the transportation. Such compensation, as the business has been increased or "developed" on the Lackawanna, or may become greater on the Lehigh Valley, seems extravagant, but whether either agreement is disadvantageous to the carrier or otherwise is matter for it to determine. Improvident management of the road is primarily a matter of internal or corporate concern, to be dealt with by the corporation and its

creditors among themselves.[19] But extraordinary or unnecessary cost of operation or management cannot be permitted to cause unreasonable or unjust rates, discriminations, preferences or prejudices." [20]

TOPIC B—CONSTRUCTION ACCOUNTS.

§ 425. Betterments considered.

It is not always easy to determine whether repairs and reconstruction of the plant of a public service company constitute annual or capital charges. This problem was forcibly stated by Mr. Justice Bradley in Union Pacific Railway v. United States:[1] "In one sense, a railroad is never completed. There is never, or hardly ever, a time when something more cannot be done, and is not done, to render the most perfect road more complete than it was before. This fact is well exemplified by the history of the early railroads of the country. At first, many of them were constructed with a flat rail or iron bar, laid on wooden stringpieces, resulting in what was known in former times as 'snake heads;' the bars becoming loose, and curving up in such a manner as to be caught by the cars, and forced through the floors amongst the passengers. Then came the T rail, and, finally, the H rail, which itself passed through many successive improvements. Finally, steel rails, in the place of iron rails, have been adopted as the most perfect, durable, safe, and economical rails on extensive lines of road. Bridges were first made of wood, then of stone, then of stone and iron. Grades originally crossed, and, in most cases, do still cross, highways and other roads on the same level. The most improved plan is to have them, by means of bridges, pass over

[19] Citing Shamberg v Delaware, L. & W. Ry., 3 Int. Com. Rep. 502, 4 I. C. C. Rep. 660 (1892).

[20] Milk Producer's Asso. v. Delaware, L. & W. Ry., 7 I. C. C. Rep. 92 (1897).

[1] 99 U. S. 402, 25 L. Ed. 274 (1878).

or under intersecting roads. A single track is all that is deemed necessary to begin with; but now no railroad of any pretentions is considered perfect until it has, at least, a double track. Depots and station houses are, at first, mere sheds, which are deemed sufficient to answer the purpose of business. These are succeeded, as the means of the company admit, by commodious station and freight houses, of permanent and ornamental structure. And so the process of improvement goes on; so that it is often a nice question to determine what is meant by a complete, first-class railroad." [2]

§ 426. Improvement of existing plant.

The doctrine finally adopted appears to be that necessary reconstruction or improvement of the existing plant, as distinguished from new construction, may be charged as annual expenditure. Thus where a statute provided that 5 per cent of the net earnings of the Union Pacific Railway should be applied to the payment of its construction bonds, and the court

[2] The American system of conducting public service companies has generally been to charge to maintenance as an annual expense: betterments, replacements, improvements and repairs. In the few cases that have considered this question this has generally been permitted, unless it is carried beyond reason. See:

United States—Chicago & Gt. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892), affirming 83 Mich. 592, 47 N. W. 489; Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1893); Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming s. c. 64 Fed. 165; Stanislaus Co. v. San Joaquin C. & I. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 241 (1903), reversing s. c. 113 Fed. 930; Milwaukee Electric Ry. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Metropolitan T. Co. v. Houston & T. C. R. R., 90 Fed. 683, B. & W. 342 (1898); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903).

Iowa—Cedar Rapids Co. v. Cedar Rapids, 118 Ia. 234, 91 N. W. 181 (1902).

Minnesota—Steenerson v. Gt. No. Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

Pennsylvania—Brymer v. Butler Water Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897).

was called upon to decide what were the net earnings, Mr. Justice Bradley said:[3] "As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; while expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof. With regard to the last-mentioned class of expenditures, however, namely, those which are incurred in enlarging and improving the works, a difference of practice prevails amongst railroad companies. Some charge to construction account every item of expense, and every part and portion of every item, which goes to make the road, or any of its appurtenances or equipments, better than they were before; whilst others charge to ordinary expense account, and against earnings, whatever is taken for these purposes from the earnings, and is not raised upon bonds or issues of stock. The latter method is deemed the most conservative and beneficial for the company, and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness. The temptation is to make expenses appear as small as possible, so as to have a large apparent surplus to divide. But it is not regarded as the wisest and most prudent method. The question is one of policy, which is usually left to the discretion of the directors. There is but little danger that any board will

[3] Union Pacific Ry. v. U. S., 99 U. S. 402, 25 L. Ed. 274 (1878).

cause a very large or undue portion of their earnings to be absorbed in permanent improvements. The practice will only extend to those which may be required from time to time by the gradual increase of the company's traffic, the dispatch of business, the public accommodation, and the general permanency and completeness of the works. When any important improvement is needed, such as an additional track, or any other matter which involves a large outlay of money, the owners of the road will hardly forego the entire suspension of dividends in order to raise the requisite funds for those purposes, but will rather take the ordinary course of issuing bonds or additional stock. But for making all ordinary improvements, as well as repairs, it is better for the stockholders, and all those who are interested in the prosperity of the enterprise, that a portion of the earnings should be employed."

§ 427. Replacement considered as repair.

So in the leading case of Reagan v. Farmers' Loan & Trust Company,[4] where it was contended that the cost of new rails should be charged to construction, and not to expenses of operation, Mr. Justice Brewer said: "Now, it goes without saying that, in the operation of every road, there is a constant wearing out of the rails, and a constant necessity for replacing old with new. The purchase of these rails may be called "permanent improvements," or by any other name; but they are what is necessary for keeping the road in serviceable condition. Indeed, in another part of the report, under the head or 'Renewals of rails and ties,' is stated the number of tons of 'New rails laid' on the main line. Other items therein are for fencing, grading, bridging, and culvert masonry, bridges and trestles, buildings, furniture, fixtures, &c. It being shown affirmatively that there were no extensions, it is obvious that

[4] 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1894).

these expenditures were those necessary for a proper carrying on of the business required of the company." [5]

Upon the whole every liberty possible should be given the companies to improve their properties out of current earnings; and it is only when it is plain that outright new construction is being entered upon that the companies should be obliged to issue new securities to provide capital. For as long as the company has a continuous policy that as improvements are needed in each year, they shall be provided for out of annual earnings, the maintenance of such a policy will roughly from year to year throw a fair share upon each year which gets the benefits of the work done in other years. Moreover this American system of maintenance of way from earnings has in practice proved itself far superior to the English system of issuing new securities for every sort of improvement, which accumulates fixed charges and otherwise hampers the railway by excessive capitalization."

§ 428. Permanent improvements should not be annual charge.

However it may be in doubtful cases where continual replacements going on from year to year may not unreasonably be considered as equivalent to annual charges to repair account, it is obvious that permanent improvements should not be charged as annual expenditures in the year in which they are constructed. The Interstate Commerce Commission had to point that out in Tift v. Southern Railway,[6] in showing the invalidity of the claim of the railway that it must be permitted to get larger gross earnings as its operating expenses were so large that it was not getting a fair net profit. Upon examination of the items going to make up the operating expense ac-

[5] *Acc.* Southern Pac. Co. v. Railroad Comrs., 78 Fed. 236, B. & W. 322 (1896); Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683, B. & W. 342 (1898).

[6] 10 I. C. C. Rep. 543 (1904).

count, the Commission discovered many expenditures which result in the permanent improvement or betterment of the property of the roads, such as, expenditures for right of way and station grounds, real estate, grading, tunnels, bridges, trestles and culverts, rails, ties, crossings and cattle guards, telegraph lines, station buildings and fixtures, shops, round houses, turntables, water stations, fuel stations, grain elevators, storage warehouses, docks and wharves, electric light plants and electric motive power plants, gas making plants, and miscellaneous structures. There were also included expenditures for equipment in the way of locomotives and cars of all kinds.

Upon this finding the Commission expressed its conclusions thus: "Although both the net and gross earnings of the defendant have grown from year to year, the percentages of what are reported by the defendants as 'operating expenses' to earnings have also somewhat increased, and this is urged as showing the necessity for an advance in the lumber and some other rates. It is to be noted, that these operating expenses embrace large annual expenditures for real estate, right of way, tunnels, bridges and other strictly permanent improvements and also for equipment, such as locomotives and cars. While payments for repairs, whether applied to permanent improvements or equipment, are properly chargeable to current annual operating expenses, this would not appear to be the case as to the improvements or equipment themselves—the former being permanent and the latter lasting for many years. The expenditures for permanent improvements and for equipment made in a single year may obviate the necessity for like expenditures or expenditures to the same extent for many years to come and the extraordinary amount of such expenditures made by the defendants in a few years preceding and including the year of the advance in rate indicates that they will not be required again for a long period of time. They should not, therefore, be taxed as part of the current or operating expenses

of a single year, but should be, so far as practicable and so far as rates exacted from the public are concerned, 'projected proportionately over the future.' If these large amounts are deducted from the annual operating expenses reported by the defendants, it will be found that the percentage of operating expenses to earnings has in some instances diminished and in others increased to no material extent."

§ 429. New construction should not be charged as an operating expense.

The rule therefore is that outright new construction should be charged to capital, and should not, therefore, be charged in as an annual expense of operation. It is hardly more unjustifiable to charge a shipper by sea the cost of the vessel than to charge a shipper by rail in a given year the cost of a new terminal freight station. This general problem was discussed with discrimination in a recent investigation by the Interstate Commerce Commission,[7] an extract from which follows: "Within recent years this railroad, in common with many others in the United States, has been extensively improved. Grades have been eliminated, curves reduced, wood bridges replaced with those of iron and stone, station buildings rebuilt, equipment of all kinds greatly added to. All this has been rendered necessary, partly by increase in traffic and partly by the desire to handle this traffic in the cheapest possible manner; and it adds very materially to the value and the earning capacity of the property. Now, in so far as these outlays are reasonably necessary to keep the property up to its former standard, or perhaps to even a higher standard of operation, they are properly a part of the operating expenses of the road, but when they add to the earning capacity of the property, and therefore to its value, they are in the nature of a permanent improvement. Assuming that the stockholder is only entitled to exact

[7] Re Advances in Freight Rates, 9 I. C. C. Rep. 382 (1902).

from the public a certain amount for the performance of the service, he clearly has no right to both receive that amount in dividends and add to the productive value of his property."

TOPIC C—DEPRECIATION REQUIREMENTS.

§ 430. Allowance for depreciation.

In general an annual charge for depreciation in value of the plant by use seems proper. This is again a matter which cannot be decided by general rules as to a standard percentage, but is a matter of careful investigation into the character of the particular plant. In one case of a water works system the judge in his opinion went into the matter and pointed out upon what details information was necessary.[1] His conclusions follow: "In the statement I have adopted the annual depreciation is placed at one per cent. I have no doubt that this is too low on general principles, based upon ordinary experience in the history of water plants. But the evidence on this question is meagre and unsatisfactory. It is difficult to arrive at any satisfactory conclusion. Engines, pumps, filters, and pipes suffer an annual depreciation of from 5 to 8 per cent. Reservoirs have a much longer life. Real estate might or might not depreciate. The only witness interrogated on this quesiton fixes the depreciation at 2 1-2 per cent. But the particular facts which would justify this estimate are not given with any degree of fullness or accuracy. The cost of the real estate owned by the company, the money expended in reservoirs, and the cost of pipes and machinery are not given in separate items. The rate of one per cent. may be considered an arbitrary one; nevertheless, there is such confusion in the evidence that I do not feel justified in fixing a higher rate. A California case, upon full and satisfactory testimony fixes the rate of annual depreci-

[1] Edwards, J., in Wilkes-Barre v. Spring Brook Water Supply Co., 4 Lack. (Pa.) Leg. News, 367 (1899).

ation at 3 1-3 per cent. upon the whole cost of the water plant. Under certain circumstances and upon full and accurate information, I surmise that such a rate would be reasonable in Pennsylvania." [2]

§ 431. Renewal of equipment to offset depreciation.

The equipment of the road must be renewed from time to time; and an expenditure of the proper proportionate amount in each year for new equipment is a proper annual charge. So in Milwaukee Electric Railway and Light Company v. Milwaukee,[3] it was held proper to buy yearly and charge to annual expenses a sufficient number of cars, with motors and complete electrical equipment, to keep up the necessary standard of equipment. It may aid one to appreciate the nature of the problem and the method of its solution to cite from the expert testimony adduced in that case and adopted by the court: "In reference to the element of depreciation, the witness Beggs

[2] The few cases which discuss the matter seem to have no doubt of the propriety of setting aside a certain amount each year to meet expected depreciation. See:

United States—Union Pac. Ry. v. U. S., 99 U. S. 402, 25 L. Ed. 274 (1878), reversing 13 Court cl. 401; Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1893); San Diego L. & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1155, 19 Sup. Ct. 804 (1899), affirming 74 Fed. 79; Cotting v. Kansas City S. Y. Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, B. & W. 316 (1901), reversing 82 Fed. 850 (1897); So. Pac. Ry. v. Railroad Comm., 78 Fed. 236, B. & W. 322 (1896); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903).

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

Michigan—Grand Haven v. Grand Haven W. W., 119 Mich. 652, 78 N. W. 890 (1899).

Minnesota—Steenerson v. Gt. N. Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

Pennsylvania—Brymer v. Butler W. Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897); Wilkes-Barre v. Spring Brook W. Co., 4 Lack. Leg. News (Pa.), 367 (1899).

[3] 87 Fed. 577, B. & W. 336 (1898).

gives the following explanation: 'I think experience has demonstrated that the utmost life that can be expected from the best roadbed that can be laid to-day would be, at the outside, ten or twelve years, when it would have to be almost entirely renewed. The Milwaukee Company is in that condition to-day, because of the different periods that their track went down, and due to the fact that it was not all put down at one time, and it must now of necessity commence to lay about 12 miles of track annually, being about one-twelfth of its total mileage; and will be required, whether they wish to or not, to lay that amount annually hereafter, and will thereby be keeping their tracks fairly up to the standard. The same applies, I might say, to the equipment. In my estimate I have calculated that the Milwaukee company must do this year, which, as a matter of fact, it is doing, what it did last year,—in other words, put on not less than 20 of the most modern, best-constructed equipments, thereby keeping its standard up to the mininmum as it has now, of 240 equipments; because I think it is fair to assume that the average life of the double equipment, taken as a whole, will not exceed twelve years, the life of the motor being somewhat less than that, and that of the car we hope may exceed it possibly several years,—I mean the car bodies; but that, in the main, we hope that we will get an average life of twelve years out of them. So, taking 20 equipments annually, you would keep to your standard of 240 equipments, which is absolutely necessary to maintain—to operate—the Milwaukee Street Railway. I mean cars complete, with motors and complete electrical equipment.'"

§ 432. Fund for repairs.

The question was carefully considered by Sir George Jessel, Master of the Rolls, in the case of Davison v. Gillies.[4] The by-laws of a tramway company required a "contingencies fund"

[4] 16 Ch. Div. 347*n* (1879).

to be set aside before the payment of dividends; and the court held this proper: "A tramway company lay down a new tramway. Of course the ordinary wear and tear of the rails and sleepers, and so on, causes a sum of money to be required from year to year in repairs. It may or may not be desirable to do the repairs all at once, but if at the end of the first year the line of tramway is still in so good a state of repair that it requires nothing to be laid out on it for repairs in that year, still, before you can ascertain the net profits, a sum of money ought to be set aside as representing the amount in which the wear and tear of the line has, I may say, so far depreciated it in value as that sum will be required for the next year or next two years. . . . It appears to me that you can have no net profits unless this sum has been set aside. When you come to the next year, or the third or fourth year, what happens is this: As the line gets older the amount required for repairs increases. If you had done what you ought to have done, that is, set aside every year the sum necessary to make good the wear and tear in that year, then in the following years you would have fund sufficient to meet the extra cost."

Where, however, the line had worn out without a proper fund having been provided for repairs, it was held that the whole amount necessary could not be charged to a single year, but only the proportionate amount.[5]

§ 433. **Authorities refusing to allow depreciation.**

There are, however, a few authorities which refuse any allowance for depreciation among the annual charges.[6] In one case the argument was this: "We see no reason why plaintiff, in addition to operating expenses, repairs, and other ordinary charges, should be allowed to reduce the apparent profits by deductions for a restoration or rebuilding fund. The setting

[5] Dent v. London Tramway Co., 16 Ch. Div. 344 (1880).

[6] Redlands, L. & C. D. Water Co. v. Redlands, 121 Cal. 363, 53 Pac. 791 (1898).

aside of such a fund may be good business policy, and, if the company sees fit to devote a portion of its profits to that purpose (though as we understand the record, no such fund has yet been created), no one can complain; but it is in no just sense a charge affecting the net earnings of the works. To hold otherwise is to say that the public must not only pay the reasonable and fair value of the services rendered, but must, in addition, pay the company the full value of its works every 40 years—the average period estimated by plaintiff—for all time to come." [7]

§ 434. Sinking fund requirements.

It is suggested in some cases that one fair annual charge is a provision for a sinking fund. Thus in Brymer v. Butler Water Company,[8] already quoted, it was said: "Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than in fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable."

But it is very questionable how far it is true that a public service company should be allowed to include in its annual charges a percentage sufficient to provide for the redemption of its bonds in so far as these bonds represent cost of construction. To adopt such a policy would make the generation during which these bonds are being paid off pay for the railroad to that ex-

[7] Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081 (1902).

[8] 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897).

tent, and yet after that it would be hard to say that the next generation could demand carriage free of fixed charges. The real truth seems to be, therefore, that a public service company should not any more expect to pay off its bonded indebtedness than to return the subscribers the subscriptions on their stock. The bonds should be refunded as they fall due, the interest remaining a fixed charge; and the stock should remain outstanding, only reasonable dividends being distributed to it.

The most that can be conceded is that, in view of the prevalent constitutional law to the effect that it is always permissible to reduce rates as long as a fair return is left upon the then value of the plant, a sinking fund may be provided to offset the gradual fall in value of the plant as the cost of construction of such plants is seen to be falling. Since the difference between the original actual cost and the fair present value may at any time be wiped out by legislation reducing rates, it may be fair to arrange matters by a sinking fund so that those who invest in an enterprise of this sort may protect themselves against this sort of loss.

§ 435. Sinking fund for municipal bonds.

Whatever may be the case where the company is owned by private stockholders, so that a payment of the bonded debt would enure to the benefit of private owners, it seems clear that a city which has issued bonds for works and supplies its citizens with water, gas, or other commodity of public concern may establish a sinking fund and sink its bonds out of annual income from the works. Two differences, at least, exist between this case and the ordinary case of bonds of a public service company. First, the credit of the city is ordinarily higher than that of the company and the rate of interest on its bonds is so much lower that the combined interest and sinking fund requirements are not much greater than the interest which the company would pay; second, that the benefit of the payment is

realized, not by individuals, but by the very body of citizens which is paying the rates.

The right of a city to sink its construction bonds from annual income was recognized in Preston v. Detroit Water Commissioners.[9] The City of Detroit owned its water works, and water rates were assessed on the basis of annual payments to a sinking fund, as well as of operating expenses. Mr. Justice Moore said: "Ever since 1873 a levy of 75,000 each year has been made, and the proceeds of the levy paid over. It has not been necessary during that time for the water board, in order to meet its expenses, to ask for any further direct tax. It is now urged that the water ought to be furnished the users at its cost, and that the interest account, the extension account, and the cost of the plant should be borne by the property of the city. Is there any equity in this contention? It is not an unusual thing for cities and villages to confer a franchise upon a private corporation to do what is being done by the board of water commissioners. The right to do this has never been questioned so far as we know, though the policy of doing it has often been questioned. Had this been done, would it be unreasonable for the private corporation to expect utimately to get back from its patrons the cost of its investment, including its extensions, with a reasonable profit? If the legislature may confer upon the municipality the right to grant such a franchise, why may not that right be exercised by the means of a board of water commissioners in the interests of the municipality, so the municipality shall ultimately own the property? In the exercise of the franchise by a private corporation, the rates fixed must doubtless be reasonable and equitable. What more can be required of the rates fixed by the water board?"

§ 436. Amortization of franchises.

Where a franchise for a limited period is granted to a public service company, it seems perhaps proper to deduct from gross

[9] 117 Mich. 589, 76 N. W. 92 (1898).

income a sufficient amount to sink the value of a secured franchise which will disappear at the end of the period, since the value of the plant is annually depreciated by that amount. In Milwaukee Electric Railway v. Milwaukee,[10] recently cited, the court continued thus: "For the causes thus stated, within general rules which are well known, it is manifest that this element must be taken into account before it can be determined that earnings derived from a plant are excessive; and in the same line there is much force in the argument of counsel that consideration should also be given to the factor of depreciation by amortization of franchises, as all the franchises in question terminate in the year 1924. The latter item, if allowed, would be a matter of simple computation; but a just measure of physical depreciation seems, to some extent, although only partially, involved in provisions for maintenance, and, while the testimony is very full and instructive upon this subject, it does not clear the case from serious difficulties in the way of stating a definite ratio or sum for such allowance."

However this may be in the case put, it is clearly so in many cases to-day where, by a scheme now much in favor in bargaining between a municipality and a public service company, it is provided that the works shall be constructed by the public service company at its own expense and operated by it as its own for a fixed period, at the end of which time the subway, or whatever it may be, is to become the property of the municipality free of payment. It is obvious that in such a case the public service company must be allowed to sink the cost of such works from sums set aside from annual earnings.

[10] 87 Fed. 577, B. & W. 342 (1898).

TOPIC D—PAYMENTS MADE TO HOLDERS OF SECURITIES.

§ 437. Whether interest on bonds is properly an annual charge.

It is very common and not unnatural to speak of interest payable upon bonded indebtedness as fixed charge and therefore one of the items in making up the total of annual expenditures. Thus Mr. Justice Brewer speaks of it in the well-known case of Chicago and Northwestern Railway Company v. Dey:[1] "The fixed charges are the interest on the bonds.[2] This must be paid, for otherwise foreclosure would follow, and the interest of the mortgagor swept out of existence. The property of the stockholders cannot be destroyed any more than the property of the bondholders. Each has a fixed and vested interest, which cannot be taken away. I know that often the stockholder and the bondholder are regarded and spoken of as having but a single interest; but the law recognizes a clear distinction. A mortgage on a railroad creates the same rights in mortgagor and mortgagee as a mortgage on my homestead. The legislature cannot destroy my property in my homestead simply because it is mortgaged, neither can it destroy the stockholders' property because the railroad is mortgaged. It cannot interfere with a contract between the company mortgagor and the mortgagee, or reduce the stipulated rate of interest; and so, unless that stipulated interest is paid, foreclosure of course follows, and the mortgagors' rights, the property of the stockholders, are swept away."

All this may well be; but as a matter of fact, the real situation is that a public service company must produce a certain amount of net income, discovered by deducting the gross annual expenses from the gross income, and that net income must be enough to pay all security holders their rate of return,—to

[1] 35 Fed. 866, 1 L. R. A. 744 (1888).

[2] Cited with approval in Southern Pacific Co. v. Railroad Commrs., B. & W. 322, 78 Fed. 236 (1896).

the bondholder his stipulated interest, to the stockholder his fair dividend. And according to modern constitutional law, both have the same protection, and both are subject to the same mischances.[3]

§ 438. **Dividends payable not classified as an annual charge.** In determining the net income it is not permissible to include dividends on the stock. Dividends must be paid, if at all, out of net income, and are in no sense annual charges or operating expenses. "It seems to us very clear that in estimating the operating expenses of a railway stock dividends cannot be included. They are no part of the cost of operation. Nor should they be included, under any of the authorities, when ascertaining the reasonableness of a rate tariff. This is in no manner denying the defendant's right to earn sufficient to pay its operating expenses, interest upon its bona fide bonded indebtedness, and a proper dividend upon its lawfully issued stock shares or value of the investment."[4] Upon appeal to the Supreme Court of the United States this principle was affirmed,[5] Mr. Justice Brown saying: "In proving that the cost of transporting *all* merchandise exceeded the rate fixed by the commission on this coal, the interest upon bonds and dividends upon stock were included in operating expenses. The propriety of the first is at least doubtful, the impropriety of the second is plain. We do not intend, however, to intimate that the road is not entitled to something more than operating expenses."

[3] Smyth v. Ames, 169 U. S. 466, 42 L.Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming s. c. 64 Fed. 165. See Steenerson v. Gt. Northern Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

[4] Collins, J., in State v. Minneapolis & S. L. R. R., 80 Minn. 191, 83 N. W. 60 (1900).

[5] Minneapolis & S. L. R. R. v. Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 901 (1902).

CHAPTER XV.

SYSTEMS OPERATED AS UNITS.

§ 441. Complications in case of systems.

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§ 441. Complications in case of systems.

If the business carried on by the public service company covers a large territory, the difficult question arises whether the system is to be taken as a whole or whether each locality is to be taken by itself. Additional complications are added to the problem when it is shown that the present system is the result of a consolidation, more or less integrated, of several properties; then the question becomes whether each of these original constituents is to be taken by itself in rate regulation or whether all are to be taken together as before. These are practical problems of great importance and therefore a separate chapter is devoted to the consideration of the propriety of such apportionment, for it is sometimes attempted.[1]

[1] The general rule is that systems shall be treated as units.

United States—Union Pac. Ry. v. U. S., 99 U. S. 402, 25 L. Ed. 274 (1878), reversing 13 Ct. of Cl. 401; Chicago, Milwaukee & St. P. Ry. v. Tompkins, 176 U. S. 167, 44 L. Ed. 418, 20 Sup. Ct. 336 (1900), affirming 90 Fed. 363; Minneapolis & St. L. Ry. v. Minnesota, 186 U. S. 257; 46 L. Ed. 1151, 22 Sup. Ct. 901 (1902), affirming 80 Minn. 191, 83 N. W. 69 (1900); Ames v. Union Pac. Ry., 64 Fed. 165 (1894); Atlantic & P. Ry. v. U. S., 76 Fed. 186 (1896); Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. 577 (1898); Interstate Com. Comm. v. Louisville & N. R. R., 118 Fed. 613 (1902).

Arkansas—St. Louis & S. F. Ry. v. Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452 (1891).

Florida—Pensacola & A. R. R. v. Fla., 27 Fla. 403, 5 So. 833 (1889); State v. Seaboard Air Line, 37 So. 658 (Fla.), (1904).

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

TOPIC A—SYSTEMS OPERATED AS UNITS.

§ 442. Methods of consolidation.

Even the briefest examination of the limitations under which consolidation of public service companies may be brought about will throw some light upon the propriety of treating systems as wholes. The consideration of this matter of the consolidation of companies belongs of course to those who are writing of the law of corporations in general. Still it may be pointed out that the present railway systems are almost invariably consolidations of various constituent companies, and that these constituent companies are almost always left in existence after the consolidation. (1) The commonest form of consolidation is perhaps by a long term lease given by the constituent road to the operating company. (2) Another equally usual is for the consolidating company to hold all or part of the stock of the constituent companies. There are, of course, two other types of combination, one less integrated than either of those just mentioned, the other more consolidated than either. (3) Thus the only bond between the railroad companies may be some traffic agreement or pooling arrangement whereby each company is left as an independent unit; (4) there may be complete consolidation, the new corporation taking over the constituent companies outright, these companies going out of existence.

It is obvious that the problem proposed for discussion in this chapter does not arise in the third and fourth types described, since, in the third, each road still remains the operating unit, while in the fourth it is plain that the new company is the sole

Pennsylvania—Wilkes-Barre v. Spring Brook Co., 4 Lack. Leg. News (Pa.), 367 (1899).

But see Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892), affirming s. c. 83 Mich. 592, 47 N. W. 489; San Diego L. & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899), affirming 74 Fed. 79; Louisville & N. Ry. v. Brown, 123 Fed. 946 (1903); Steenerson v. Gt. N. Ry., 69 Minn. 353, 72 N. W. 713 (1897).

operating unit. Whatever difficulties there may be will occur in the first and second cases. Like most questions of rate regulation, this question may arise in one of two ways: one aspect of it will be whether a railroad company operating leased lines or held lines is justified in treating its system as a whole; the other side of the question will be whether such an operating company can be required at all to consider its system as a whole in making rates.

In regard to both questions it may be pointed out that the law of corporations, and particularly the law of public service companies, forbids absolutely one such company leasing itself to another and also the holding of the controlling interest in the stock of one such corporation by another. The only way in which combination along these lines may be perfected therefore with safety is by express permission of the Legislature of the State, obtained in one form or another at one time or another. It may fairly be argued, therefore, that since this railway system is organized with the consent of the State, it is not unjustifiable for the management of that company to deal with the public upon the basis that the system is a unit; and furthermore, it cannot be complained by the owners of this system, who have applied for the power to combine, if the State in regulating charges in the future treats the system as a whole.

§ 443. Divisions as integral parts of the whole system.

It must, however, be insisted upon as the usual solution of this problem that the railway system shall be treated as an entirety. By this conception every division is as much an integral part of the whole system as the different portions of the main line are. And the contention is that it is not proper to segregate a division and fix rates for it upon the basis of its own finances taken by themselves, although some slight scope may be given to such considerations.

This general principle was well expressed, and the reasons establishing it were well set forth, in an early proceeding before

the Interstate Commerce Commission, a significant extract from which is subjoined; speaking of an outlying division which was part of a consolidated system it was said: "They are feeders to the main lines and help swell the revenues of those lines. Their profitableness is not to be measured solely by what they earn themselves, but by the increase of business and revenue they bring to the main lines. For book-keeping purposes it is proper enough to keep their accounts separately, but for their usefulness to the system of which they form a part, these accounts are slight evidence and these feeders are entitled to a much larger credit. A selected fractional part of any great railroad might be taken and a showing made by an apportionment of earnings and cost of operation and fixed charges, that it is unprofitable, but this would furnish no indication of its value and profitableness as an important part of the whole property. For purposes of rates the several auxiliary roads should not be looked upon as wholly independent lines which may separately establish rates looking only to a satisfactory ledger account of each separate road. These subordinate and branch roads are, for all purposes of control and operation, parts of one great system."[2]

§ 444. Branch lines.

The typical railroad system has trunk lines with ramifying branches. To a certain extent it is plain that the main lines with their denser traffic can be operated at less cost per ton per mile than the lateral branches. At the same time if in a total haulage the distance upon the branch is short relatively to the distance upon the main line, it may not be unjustifiable to make the same proportionate rate for the whole distance. This was one of the many points brought out in the important case before the commission concerning rates upon milk from the tributary territories about New York brought daily to the city

[2] Per Commission in Delaware State Grange v. New York, P. & N. Ry., 3 Int. Com. Rep. 554 (1891).

itself.[3] In that opinion it was said: "Ordinarily, the branch line traffic should pay more, but most of the branch lines in the nearby section are short, all of them have heretofore been given main line rates on this traffic, and some of them pass through main line stations of other roads or lead to or near the Hudson River where the traffic is affected by the competition of a line of steamers. Again, with an additional charge over main line rates from nearby branch line points, applying the same rate on main and branch lines in the distant region, which the long-distant carriers will doubtless deem necessary, would hardly be consistent. In view of these facts, we think that the group distances and rates for this traffic should be made to apply on branch as well as on main lines."[4]

§ 445. Unprofitable portions of the line not considered.

In Steenerson v. Great Northern Railway[5] the court considered at length the subject of unprofitable lines; and held that the profitable portions of the system could not be compelled to pay the loss on lines built through a newly and sparsely settled country. The reasoning of Mr. Justice Canty is as follows: If, he said, the road was profitable a certain reasonable rate would be fixed. If then a new and unprofitable extension were made, and the accounts covered the whole system, the rates on the older portion of the road would necessarily be raised, and that portion would bear the burden of the new extension. But why should the older portion of the line bear a loss due to the mistaken management of the company?

"To say that the country owes a railroad company a living is one thing. To say that the country must indemnify a railroad company against all of its own mistakes is a very different

[3] Milk Producers Protective Assn. v. Delaware, L. & W. Ry., 7 I. C. C. Rep. 92 (1896).

[4] See, also, Northwestern Ia. Grain & S. Assn. v. Chicago & N. W. Ry., 2 Int. Com. Rep. 431 (1891).

[5] 79 Minn. 353, 72 N. W. 713 (1897).

thing. To hold that a railroad company can impose on the public all kinds of burdens, by all kinds of unbusinesslike ventures and speculations would be monstrous. These considerations lead to the conclusion that when any feeder or extension, portion of a railroad line or system is an incumbrance on the rest of the line or system, so that the rest of such line or system would, at the same rate, produce more net income if such portion did not exist, then such portion is not self-supporting; that is, if all the gross earnings on all the traffic passing over such portion, and on the whole length of the haul on such traffic, will not pay the operating expenses on such traffic for the whole length of such haul, and pay for the wear and tear on the line caused by such additional traffic, and also pay a reasonable income on the cost of reproducing such portion of the line, and these conditions are not of a temporary character, but are the result of building the feeder or extension where there was not sufficient business to justify its existence, then such portion is not self-supporting. A portion of a line that is not self-supporting is not a feeder, but an incumbrance; and in determining what are reasonable rates on the rest of the line or system, any State has a right to reject such portion from the line or system. Of course, in rejecting the same all benefit to the rest of the line or system from traffic passing over such portion must also be rejected, and nothing can be allowed to the rest of the line or system on such traffic, except the operating expenses on the same, including the additional wear and tear on the rest of the road caused by such traffic. Whether this rule would apply where such a portion of a line or system ceased to be self-supporting by reason of some temporary cause, such as an unusual drought or a pestilence, we need not consider."

It is perhaps fair to point out that in a later portion of the same opinion the court expressed the opinion that the whole system should be entitled to share the prosperity of each constituent part of it.

§ 446. Whole systems should be taken together.

Upon the whole it would seem in most cases justifiable for the company conducting a consolidated system to take the attitude that the system should be treated as an entirety. This is certainly true when the system serves only one locality wherein the conditions are substantially the same. Thus in Wilkes-Barre v. Spring Brook Water Company et al.,[6] Mr. Justice Edwards, in reviewing the accounts of a water company to decide whether its rates should be reduced or not, said: "The plaintiff's counsel and one of the witnesses in the form of questions and answers discussed the propriety of charging to the Wilkes-Barre system the total cost of the Mill Creek plant and the pipe lines carrying the Huntsville water to collieries outside of Wilkes-Barre without adding to the revenue columns the rates collected from persons outside the city. The contention on the part of the plaintiff is reasonable. All the revenue belonging to a water plant should be accounted for in order to decide whether a company is receiving a fair return on the total cost of the plant."

§ 447. Rates on different parts of same system apportioned.

It has however been held in other cases that the receipts and charges of each part of a system should be considered separately. In San Diego Land and Town Company *v.* National City,[7] where it appeared that a water company was supplying a town and also a large agricultural territority outside the town, the court held that in determining what were reasonable rates for supplying water to the inhabitants of the town the charges should be fixed with a view to yielding a fair rate of interest on the value of that part of the plant referable to the territory embraced in the town, without attempting to make compensation for losses sustained in the distribution of water to the ter-

6 4 Lack. Leg. News, 367 (1899).
7 74 Fed. 29 (1896).

ritory outside the town. On appeal to the Supreme Court of the United States this was upheld, and Mr. Justice Harlan said:[8] "One of the points in dispute involves the question whether the losses to the appellant arising from the distribution of water to consumers *outside of the city* are to be considered in fixing the rate for consumers within the city. In our judgment the Circuit Court properly held that the defendant city was not required to adjust rates for water furnished to it and to its inhabitants so as to compensate the plaintiff for any such losses. This is so clear that we deem it unnecessary to do more than to state the conclusion reached by us on this point."

TOPIC B—HOLDING CORPORATIONS.

§ 448. Apportionment to constituent companies.

Where several railroads, retaining their separate corporate identity and nominally operating their own lines, are really constituent parts of a whole great railroad system, under one management, the income of the whole system must be considered together; and the court in passing upon the rates of the system must determine the reasonableness of the division of income between the different roads. In such a case the constituent roads may be controlled through ownership by the principal road of the whole or a majority of the stock, or through a pooling arrangement by which the stock of the subordinate roads is placed in trust to secure the integrity of the system.

Such a case was presented to the court in the case of Steenerson v. Great Northern Railway.[1] The Great Northern, itself made up of several leased lines, controlled also several separately incorporated and nominally independent roads and steamship lines; it owned all or substantially all of the stock of most of these corporations, and the stock of the rest had been

[8] San Diego L. & T. Co. v. National City, 174 U. S. 739, 758, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899).

[1] 69 Minn. 353, 72 N. W. 713 (1897).

placed in trust. Some of these stocks were credited with large dividends. It was held that, assuming the right to maintain the independence of these roads although they formed part of the system, the court would examine the reasonableness of the division of income between the constituent roads. Mr. Justice Canty said: "The amount of the profits of each depends almost wholly on the character of its dealings with the Great Northern Company, and is in fact a mere matter of book-keeping in which the officers of the latter company divide the joint profits as they see fit. But, so far as the rights of the patrons of the railroad may be prejudiced by any such division, they are not bound by it. When the two contracting parties are in fact one, so that one party is merely dealing with himself, the rights of third parties cannot be concluded by such dealing. And when a party deals with himself in such a case the burden is on him to show that the transaction is a fair and equitable one. The burden was on the Great Northern Railway Company, in this case, to show that the division of profits between it and these other corporations was fair and reasonable, and it failed to offer any evidence on that point. The presumption against it is also heightened by the appearance of things. Here are some parts of its railway system and some of these other corporations earning as dividends from 8 to 120 per cent. per annum, and no explanation is given. It is highly commendable, in the management of this system, that it organized all of these profitable enterprises for the benefit of all of its stockholders, and not for the benefit of the managers and their favorites, as has been done by railway managers in so many other instances. But the fact that it has organized for the benefit of its stockholders all these profitable side enterprises which feed off this railroad system does not change the presumption as between it and the public, or show that it has been equally fair and disinterested towards the patrons of the road. Here, for instance, is the Willmar & Sioux Falls branch, which is a mere feeder of one of the main lines, earning in these dull times a

dividend of 10 per cent. above the interest on its bonds, while, as the railway company claims, the main line is earning no dividend at all, or scarcely any. The division of profits in this instance may be fair and reasonable, but it will certainly take evidence to prove that it is."

§ 449. **System taken as a whole.**

It is questionable, at least, whether the division of the line into its constituent roads is allowable, whether the earnings and expenses of the whole line must not be lumped together, in spite of the nominal independence of parts of it. This doubt was expressed by Mr. Justice Canty in the case just cited: "It may be a question whether this entire railway system should be thus divided up at all. As appears by the court's findings above quoted, there are a number of other separate railroad corporations whose stocks are owned by the Great Northern Company. The railroad properties of most of these other companies are a part of the Great Northern system. A fair dividend was declared on the stocks of some of these companies, and none at all on the stocks of others. It may be that this whole railroad system is tied together for better and for worse; that it is immaterial how the management has apportioned the profits between the different parts of the system, and that, for the purpose of determining whether rates fixed by one State are confiscatory, the only division that can be made of the whole system is into the portion which is self-supporting and the portions which are not self-supporting, as before stated; and that, after rejecting the latter portions, it only remains to be determined whether the rates thus fixed by the State are comparatively lower than the rates beyond the State, so that a like reduction of the latter rates to the same comparative level would result in such a deficiency of income as to be confiscatory. On these points we will express no opinion. But, unless substance is sacrificed to form, it may be that the separately incor-

porated portions of this railway system should not, for the purposes of such a case as this, be regarded as separate railroads."

§ 450. When constituent roads are operated under separate charters.

It is held in some cases that the fact that the constituent roads still preserve their original charters and are theoretically operated under them is sufficient to justify the requirement that each shall be treated by itself in rate regulation. Thus in one recent case,[2] where the propriety of a reduction in rates ordered by the railroad commission of Florida was in question, it was shown that the Pensacola & Atlantic division of the Louisville & Nashville Railroad System was in reality a separate corporation. It was shown that the rates enforced would not give an adequate return upon the Pensacola & Atlantic Railroad itself, although the Louisville & Nashville System was shown to be profitable. Upon these facts Judge Pardee granted an injunction to prevent the enforcement of these rates, saying in substance: "The fact that a line of railroad is operated in connection with other lines owned by the same company, but under separate charters, whereby the earnings of such line are increased and its operating expenses reduced, does not prevent its being considered as a separate and independent line for the purpose of determining the reasonableness of rates thereon, fixed by the State; full consideration of the joint operation being given when the road is credited for the increated business and reduced expenses."

§ 451. Systems considered as wholes.

Specific illustration of the general matters which have been discussed under this topic may help to an appreciation of the general problem. In a comparatively recent investigation, Re Advances in Freight Rates,[3] upon certain lines, the Interstate

[2] Louisville & N. R. R. v. Brown et al., 123 Fed. 946 (1903).
[3] 9 I. C. C. Rep. 382 (1902).

Commerce reported upon various ones of the principal railroad systems, among them the Lake Shore & Michigan Southern Railway, itself a part of a "community of interest." Extracts from this report follow:

"The Lake Shore & Michigan Southern, on June 30, 1901, owned a majority of the capital stock of its competitor, the New York, Chicago & St. Louis Railroad Company, a majority of the capital stock of its connection, the Pittsburg & Lake Erie Railroad Company, almost one-half of the capital stock of the Lake Erie & Western Railroad Company, and $11,224,000 of the capital stock of the Cleveland, Cincinnati Chicago & St. Louis Railway Company, besides smaller holdings in other companies. These stocks had been acquired, in addition to the payment of dividends not less than 6 per cent., for many years, out of net earnings. During the year 1902 it purchased, apparently out of surplus, $4,728,200 of the capital stock of the Indiana, Illinois & Iowa Railroad Company, the entire capital being $5,000,000.

"This company after paying 7 per cent. dividend to its stockholders has a surplus each year sufficient to buy the control of a very considerable railroad. Before holding that its revenues ought to be further increased, or that the government ought not to exercise any supervision over those revenues, it may be well to consider what the bearing of this process, continued for half a century, is to be upon two of the great economical problems before us, namely the distribution of wealth, and the control of the avenues of transportation."

§ 452. When corporations of diverse characters held.

Where, however, a railroad system owns corporations of another sort, they would hardly be held to form so integral a part of the system that their receipts and charges should be brought into the same account. Thus in the case just examined[4]

[4] Steenerson v. Gt. No. Ry., 69 Minn. 353, 72 N. W. 713 (1897).

the Great Northern Railway owned a steamship line and a coal company; and it was held that the finances of these corporations should be separately kept, Mr. Justice Canty said:

"Even if these separately incorporated portions must be regarded as one railroad, or a single system, it is still a question whether the plant of the Northern Steamship Company should be regarded as a part of that system, and it is still more doubtful whether the mines or plant of the Sand Coulee Coal Company should be so regarded; and, if these plants should not be considered a part of the railway system, the Great Northern Railway Company would not have to put into the common pot in this case such profits of those two concerns as result from a just and equitable division of profits between the railway system and each of these other plants. But the burden would still be on the railway company in this case to show that it has made such a just and equitable division of such profits, and, as before stated, it has failed to maintain that burden."

And on a similar principle, where a grant of land was made to a railroad, taxes on the land and land office expenses were not proper annual charges on the railroad; the finances of the land office should be kept separate from those of the railroad.[5]

TOPIC C—LEASED LINES.

§ 453. Rent of leased roads.

Where a *bona fide* lease of one road to another is made, the operating road is entitled to include the rent of the leased road in its operating expenses. It is the annual expense of providing its appliances for carrying on its public business, and as such is a proper annual charge against gross income. In the case of Southern Pacific Company v. Board of Railroad Commissioners,[1] where the question involved was the reasonableness of the rate established by the Commissioners for the

[5] Southern Pacific Co. v. Railroad Comrs., 78 Fed. 236, 272 (1896).
[1] 78 Fed. 236 (1896).

Southern Pacific system, it appeared that an annual rental of $600,000 was to be paid by the Southern Pacific Company to the California Pacific, a leased road. It was urged that certain fixed charges on the system which had been paid by the lessor should not be deducted. It was, however, held that the entire rent should be deducted. Mr. Circuit Judge McKenna said: "It is not very clear why the fixed charges should be charged, and the rent not charged, or why the former should be deducted from the latter. As we have seen, and shall see, it is the expenditures of the Southern Pacific Company which we can only consider. Was the rent or were the fixed charges such an expenditure? By the terms of the lease, there was to be paid by the Southern Pacific Company to the California Pacific Company a rental of $600,000 per annum, and it is provided that 'it will, during said term, keep and maintain said property in good order, condition, and repair, and operate, add to, and better the same at its own expense, and will pay all taxes legally assessed against or levied thereon.' The rent, therefore, is as much an annual expenditure as the taxes and betterments are and why, then, should it not be allowed, or why should something be allowed out of it, or instead of it, which is not an expenditure to the Southern Pacific Company?"

§ 454. Rental must be fixed in good faith.

The rent must be agreed upon in good faith; otherwise it would be in the power of the owners of a railroad to increase the annual charges, by successive leases, to such an extent that any rate would be reasonable. But granting the good faith of the lease and the reasonableness of the rent, it is a proper element of charge. To quote again from Mr. Circuit Judge McKenna: "The objection to allowing the rental is stated by one of the counsel to be that any rent could be charged or successive lettings be made with successive rentals, and all with the same propriety and legality be charged. Whether this would be done is improbable. That it could be done legally would depend

upon good faith, and the relation and proportion of the rent to the property. I see, therefore, no objection to this charge of $600,000 rental. It is an annual expenditure of the Southern Pacific Company, to be annually reimbursed to it from the income of the road with other expenditures." [2]

§ 455. If rental becomes unjustifiable.

According to the Minnesota doctrine[3] by which the reproduction value of the road is the only proper basis of charge, the operating line cannot charge to annual operating expenses the agreed rental of a leased line, even though it was reasonable at the time the lease was made, if it is now higher than is justified by the present rate of income and reproduction value of the leased road. "If the amount of such fixed charges exceed the amount of what is a reasonable income on the cost of reproducing the road, the patrons of the road should not be required to pay the excess."[4]

§ 456. Betterments of leased roads.

Money expended by the operating road in making betterments on the leased road may or may not be chargeable to current income. If the making of betterments is required by the lease at the expense of the operating railroad, the expenditure is really part of the rent of the road, and is therefore a proper annual charge. And this was held even in a case when at the expiration of the lease, fifty years later, the then cash value of the betterments made during the term was to be repaid to the lessee; the Court remarking that "it would be hard guessing to say what traces of them would be left in fifty years." [5] Where

[2] So. Pacific Ry. Co. v. Railroad Commrs., 78 Fed. 236 (1896).

[3] *Ante*, § 328.

[4] Canty, J., in Steenerson v. Great Northern Ry., 69 Minn. 353, 72 N. W. 713 (1887).

[5] Southern Pacific Co. v. Railroad Comrs., 78 Fed. 236, 268 (1896), per McKenna, J.

however, the betterment is to be made at the expense of the leased road, or where the expense of it diminishes by so much the rent, the betterment is not a proper annual charge of the operating road. It is true that betterments are usually proper annual charges; but in this case it is a betterment of the leased and not of the operating road, and can no more be charged against the receipts of the latter road than the official salaries of the leased road.

"It is clear, therefore, that, if the railroad was added to or bettered, it was to be out of the income which the Central Pacific Company was entitled, and which would, if not so expended, be paid to it. It is true that the lease provides for the contingency of the payment of such expense by the Southern Pacific Company, but it also provides for its repayment, so that it is not, in any case, a deduction from its revenue. If it be said that the Regan case makes such expenses proper as operating expenses, the answer is, it was competent for the parties to stipulate otherwise; and now to hold it a charge on the Southern Pacific Company would be to restore the liability of the lease as it stood in 1888, and which was altered as far as omissions and explicit enumeration could alter it. Hence it follows that the item of $111,786.71, for betterments and additions to the Central Pacific Company, should not be allowed as an expenditure of the Southern Pacific Company."[6]

[6] McKenna, J., in Southern Pacific Co. v. Railroad Comrs., 78 Fed. 236, 268 (1896).

TOPIC D—PECULIAR EXPENSE OF THE PARTICULAR SERVICE.

§ 457. **Special circumstances affecting the particular rate.**

There may be special circumstances connected with a particular transaction which increases or decreases the cost of service; and the effect of such circumstances on the rate must be considered. For instance, the expense of constructing a mountain branch may be very much greater than that of building the main line; or the population served by the company may

in places be so sparse as to make the cost of operation very great in proportion to the service demanded. All these circumstances may properly affect the rate charged in those portions of the territory served by the company; yet it appears unjust to place the whole burden upon such territory, thus accentuate its poverty, and place another handicap upon it in the effort to become prosperous. Not all the extra cost of service should be placed upon the particular customers.

At the same time, many things besides the mere mileage run must be considered in fixing the rates. A uniform mileage rate imposed upon all railroads would be in reality unequal and unjust. As Mr. Justice Morse said in Wellman v. Chicago & Grand Trunk Railway:[7] "If no classification can be made, and the maximum rate must be fixed the same for all, then the law is admitted to operate unequally and unjustly, because some companies are to less expense than others in the same length of road by reason of the nature of the country through which they run; some have costly terminal facilities, and some have not; some owe large amounts, and some do not; and some do a large amount of business, and some do not."

§ 458. Divisions built through a difficult territory.

When a road or part of a road is built through a mountainous country or other country which requires expensive construction, the charge may be greater than on other portions of the road or other roads where the cost of construction per mile is less. So where different rates were prescribed for railroads on the lower and on the upper peninsula of Michigan, this difference was held proper. "The distinction between the roads of the upper and lower peninsulas must be considered, in the absence of any showing to the contrary to be a reasonable one. We are authorized to take judicial knowledge, for it is a matter of general knowledge, that the cost of building and running railroads in

[7] 83 Mich. 592, 47 N. W. 489 (1890).

the upper peninsula is much greater than that in the lower, owing to the marked, physical difference between them in the character and face of the country."[1]

§ 459. Divisions in sparsely populated territory.

It is clear that where a division of a railroad runs through a sparsely populated country, so that the amount of business done upon it is comparatively small, and the net earnings are therefore much below the average of the whole road, the charges may be greater than the charges on the other parts of the road. This was discussed in the case of Ames v. Union Pacific Railway[2] by Mr. Justice Brewer: "It is, however, urged by the defendants that, in the general tariffs of these companies, there is an inequality; that the rates in Nebraska are higher than those in adjoining States, and that the reduction by House Roll 33 simply establishes an equality between Nebraska and the other States through which the roads run. The question is asked, Are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively they are. That is, the roads may not discriminate against the people of any one State, but they are not necessarily bound to give absolutely the same rates to the people of all the States; for the kind and amount of business and the cost thereof are factors which determine largely the question of rates, and these vary in the several States. The volume of business in one State may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both States might result in one in great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two States are of little value, unless all the elements that enter into the problem are presented. It may be

[1] Morse, J., in Wellman v. Chicago & G. T. Ry., 83 Mich. 592, 47 N. W. 489 (1890).

[2] 64 Fed. 165, 188 (1894), cited and approved by Harlan, J., on appeal; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898).

true, as testified by some of the witnesses, that the existing local rates in Nebraska are forty per cent. higher than similar rates in the State of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two States is of comparatively little significance."

This same line of argument was pithily put by Mr. Justice Canty in Steenerson v. Great Northern Railway,[3] when he asked, "Why should the people of Minnesota and Eastern Dakota be made to pay an income on this idle railroad property further west?" And in Wellman v. Chicago & Grand Trunk Railway[4] Mr. Justice Morse said: "A classification according to the amount of business done per mile seems to me to be the fairest and the most reasonable classification, if railroads are to be classed at all, in the fixing of the maximum rates."

§ 460. Way stations.

Local shipments are more expensive to handle in proportion to the mileage than long distance shipments, and a greater proportionate charge is therefore justified. "The operating expenses of a railroad consist of two principal items: (1) Cost of maintenance of plant; (2) cost of conducting transportation. The former item is constant, and can justly be divided between the different kinds of traffic in proportion to their volume. As to the second item, however, such a division cannot properly be made; for it is agreed, by all who have had occasion to consider the subject, railroad commissioners as well as railroad officials, that the cost of conducting transportation is, relative to income, much higher for local business than for the general business of a road. The causes of this added cost are chiefly

[3] 69 Minn. 353, 72 N. W. 713 (1897).
[4] 83 Mich. 592, 47 N. W. 489 (1890).

three: (1) The shortness of the haul; (2) the lightness of the train loads; (3) expense of billing and handling the traffic."[5]

Because a greater charge is made on local than on through business, it by no means follows that all the charge of maintaining a station can be laid upon the business done at that station. If, for instance, a small amount of business is done at a station the rates cannot be made much greater at that station than at a neighboring way station, where three or four times as much business is done.

§ 461. General requirements may produce particular losses.

Consistent with this general conception is the contention supported by some cases that transportation for particular transits may be required to be made according to some general system of rates, producing a fair return for the system as a whole, although it is alleged that in a particular instance loss will result. Such were, perhaps, the facts in Missouri Pacific Railway v. Smith,[6] and the court in the majority opinion written by Mr. Justice Battle said: "Appellants further allege that the act of April 4th was unreasonable in fixing the rate for the carriage of a passenger at three cents a mile in this: that the actual cost and expenses of transporting each passenger and his baggage over the Little Rock & Ft. Smith Railway are more than three cents a mile, and that by reason thereof the company operating the road is compelled to transport passengers at a loss. To dispose of this defense, it is sufficient to quote from the opinion in Railway Co. v. Gill,[7] as follows: It [railway company] can only claim a profit from the operation of its entire line, and attack as unjust an act that denies it the right

[5] Amidon, J., in Northern Pac. Ry. v. Keyes, 91 Fed. 47 (1898). Though the decision was reversed on appeal, this point was approved and reinforced by the Supreme Court.

[6] 60 Ark. 221, 29 S. W. 752, 5 I. C. C. Rep. 348.

[7] 54 Ark. 112, 15 S. W. 18.

to fix such rates as will yield a profit upon its aggregate business."

§ 462. Plant adapted for larger population.

Where a costly plant is built with the purpose of supplying a large future population, the customers served before the full development of the territory cannot be forced to pay the full expense. The plant must be operated for a fair compensation, even though it results in a loss to the company, and the company must recoup itself, if at all by charging these losses to construction account as part of the expense of establishment. On this question Mr. Justice Holmes, in San Diego Land and Town Company v. Jasper,[8] said: "The supervisors, in determining the rates, assumed that the amount of water available for outside irrigation, apart from the amount used and paid for by National City, was enough for a little over 6,000 acres, and on that point there is no serious dispute. Then they fixed the rate as if the company supplied this 6,000 acres, although such was not the fact. Of course, the amount actually received for the water actually furnished was correspondingly less than the receipts as estimated by the supervisors upon their assumption. If there were no force in any of the arguments for the appellees which we have passed by, the result of this mode of estimate might be that the appellant did not get 6 per cent. on the total value of its plant. But here, again, we have to distinguish between Constitution and statute. If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or, apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two-thirds of the contemplated number should pay a full return." [9]

[8] 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903).

[9] *Acc.* Boise City I. & L. Co. v. Clark, 131 Fed. 415, 65 C. C. A. 399 (1904).

TOPIC E—DIVISION BETWEEN INTERSTATE AND INTRASTATE BUSINESS.

§ 463. Alternative theories of apportionment.

Where a road runs through several States, it is quite obvious that in determining the reasonableness of a rate established by one of the States the situation of the whole line must be considered. One of two plans must be adopted: If the income of the whole line is taken as a basis of inquiry, then the possibility of the other States fixing a similar rate must be considered; or if, on the other hand, the one rate is considered its reasonableness must be determined by an examination of the capitalization and income of the road within the particular State. This was pointed out by Mr. Justice Brewer in the leading case of Chicago & Northwestern Railway v. Dey:[1] "Defendant's road runs through other States; these States may impose no schedule of rates; part of its business is interstate, and only Congress can limit that; so that from the business elsewhere revenues may be earned which will enable it to make up any deficiency in this State. But the invalidity of this schedule does not depend upon legislation or action elsewhere. If this schedule may be put in force here, a similar one may be in Illinois, Minnesota, and other States through which the company's road runs. For some purposes its property in this State is separate and distinct from its property elsewhere, and out of this property within this State it is entitled to receive some compensation. Robbing Peter to pay Paul has never received judicial sanction."

§ 464. Whether State lines are arbitrary.

The first alternative that the reasonableness of the rate must be determined upon the assumption that the same rate will be adopted throughout the whole system was that applied in

[1] 35 Fed. 866, 1 L. R. A. 744, 2 Int. Com. Rep. 325 (1888).

Steenerson v. Great Northern Railway.[2] Mr. Justice Canty said: "It seems to us that there is scarcely any good reason why a railway system should be divided on State lines at all, for the purpose of fixing rates. After rejecting the portions that are not self-supporting, the balance of the system may be considered as a whole; and, in fixing rates in one State, it will only be necessary to see that, if rates are properly adjusted throughout so as to correspond with the rates thus fixed, the whole of such balance of the system will yield a reasonable income on the cost of reproducing the same. In determining what is a proper adjustment of rates between the different portions of the system, every case must depend on its own circumstances."

§ 465. **Constitutional requirement for division.**

The Supreme Court of the United States, however, has adopted the other alternative, and has separated the value of the plant used for merely intra-state business and the net earnings from such business, thus determining the reasonableness of the rate fixed by the State. The leading case on this point is Smyth v. Ames.[3] Mr. Justice Harlan said in that case: "It is further said, in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court should take into consideration, among other things, the whole business of the company, that is, all its business, passenger and freight, interstate and domestic. If it be found upon investigation that the profits derived by a railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the legisla-

[2] 69 Minn. 353, 72 N. W. 713 (1897).
[3] 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898).

ture prescribe rates for domestic business that would bring no reward and be less than the services rendered are reasonably worth? Or, must the rates for such transportation as begins and ends in the State be established with reference solely to the amount of business done by the carrier wholly within such State, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line

is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."[4]

§ 466. Methods of division.

The method of procedure in such a case is to find what part of the gross receipts is derived from business within the State, and then find the actual cost of doing the business. This cannot be found by taking a proportionate part of the cost for the entire line, since the cost of moving local freight is greater than that of moving through freight. "Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from main to side tracks is greater; there are the wages of the employees at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true when there are two separate trains, it is more so when the same train carries both local and through freight. It is impossible to distribute between the two the relative cost of carriage. Yet that there is a difference is manifest, and upon such difference the opinions of experts familiar with railroad business is competent testimony, and cannot be disregarded." The fact that an exact mathematical computation of the cost is impossible is immaterial; the cost must be found, as best it may, before the reason-

[4] Accord Chicago, M. & St. P. Ry. v. Thompkins, 176 U. S. 167, 44 L. Ed. 418, 20 Sup. Ct. 336 (1900), affirming s. c. 90 Fed. 363 (1898); Chicago, M. & St. P. Ry. v. Smith, 110 Fed. 473 (1901); State v. Atlantic Coast Line et al. (Fla.), 37 So. 652 (1904); State v. Seaboard Air Line (Fla.), 37 So. 658 (1904).

ableness of the local rate can be determined. "There are many things that have to be determined by court and jury in respect to which mathematical accuracy is not possible." [5]

In a late case,[6] the problem was discussed in this manner: "The other issue the respondent has likewise failed to meet. Taking the figures from the brief filed by the respondent, we find that the local business alone produces a net earning of at least 3 per cent. on the total value of the road in Florida, charging against such income the whole of the taxes. While a State is not permitted to offset local business against interstate business, and to justify low local rates by reason of the profitableness of the latter, yet the interstate and foreign business may and should be considered in determining the proportion of the value of the property of the company assignable to local business. There is no proper showing of the interstate and foreign business, so that we may determine on what fraction of the whole value of the property in Florida the company might be entitled to earn an income from local business. There is, however, a showing that the interstate and foreign business is large, and on a proper showing and a proper proportioning of the service between domestic and foreign business this percentage of net income would be largely increased. Under the scheme of distribution of the earning of the whole road between the several States through which it runs, a ton of Florida oranges or early vegetables is allowed the same credit as a ton of coal in Virginia, and no more. We have examined with care all the rate cases decided by the Supreme Court of the United States, and see nothing therein to conflict with the views expressed above."

[5] Chicago, M. & St. P. Ry. v. Tompkins, 176 U. S. 167, 44 L. Ed. 418, 20 Sup. Ct. 336 (1900), reversing s. c. 90 Fed. 363 (1898).

[6] State v. Atlantic Coast Line (Fla.), 37 So. 657 (1904).

TITLE II.

Reasonableness of Particular Rates.

CHAPTER XVI.

FACTORS OPERATING IN THE ESTABLISHMENT OF PARTICULAR RATES.

§ 471. Distribution of the burden of the schedule upon different articles carried.

TOPIC A.—COST OF SERVICE AS THE BASIS OF RATE MAKING.

§ 472. Method of estimating cost of service.
473. Basis of proportionate rate the ton-mile cost.
474. Cost of carriage as a factor affecting particular rate.
475. Insufficiency of the principle of the cost of service.
476. Length of haul as a factor affecting a particular rate.
477. Modification of the principle of the length of haul necessary.
478. Volume of traffic as a factor affecting the particular rate.
479. Limitation upon the law of increasing returns.
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TOPIC B—VALUE OF THE SERVICE AS THE BASIS OF RATE MAKING.

§ 481. What the traffic will bear as a factor affecting particular rate.
482. Essential defects in the principle of charging what the traffic will bear.
483. Making rates compared with levying taxes.
484. Rates may be shown to be unreasonable in themselves.
485. Adjustment between the claims of the company and the patron.
486. Equalization of advantage as a factor affecting the particular rate.
487. Carriers not obliged to equalize disadvantages.
488. Competition as a factor affecting the particular rate.
489. Conclusion as to proportionate rate.
490. Classification the method of establishing the particular rate.
491. All factors enter into the determining of a particular rate.

§ 471. Distribution of the burden of the schedule upon different articles carried.

From the point of view of the carrier, as has been seen, it is enough if the schedule as a whole yields a fair return by way of profit. To the individual shipper, however, the effect of the tariff as a whole is quite immaterial. He is interested in a single rate only, that upon the goods which he is shipping; and from his point of view the important thing is that such goods shall pay no more than a reasonable part of the whole necessary return to the carrier. It is necessary, therefore, to consider next the rules for the proper distribution of the whole burden of the charge upon the individual articles carried. To look at the problem from another point of view, the entire schedule of rates having been established, so that the proportion is properly fixed, it will be easy to test the validity of the rates. The amount to be raised by the entire schedule of rates having been determined, according to the principles already examined, the sum of all the particular rates must equal that amount; and this sum is determined by adding the rates received on account of the known traffic at each station.

Topic A.—Cost of Service as the Basis of Rate Making.

§ 472. Method of estimating cost of service.

In the preceding chapters the total amount of annual receipts which the carrier is justified in taking from its whole business has been discussed. These were, in brief, all annual expenditures, including an allowance for depreciation requirements, and in addition the fair capital charges for the year, arrived at by determining what would be a reasonable return upon proper capitalization. A railroad must get this total from its passenger traffic and from its freight traffic. The first difficulty is to decide what proportion should be contributed by the

passenger traffic and by the freight traffic respectively; then the same difficulties remain in apportioning to each item of traffic a fair share of the burden. It may be difficult, if not impossible, to apportion to each portion of the traffic its proportionate share of the fixed charges with any degree of accuracy, but at the same time, there are certain items in the cost of performing a particular service which should never be left out of account by a railway management in making its rate for that service. Thus an expert railway management ought to be able to estimate with some degree of accuracy the particular expenditures involved in moving a carload from one point to another—wages, coal, oil and the like. It would be wrong plainly to ignore the cost of service in so far as it may be estimated; for to serve some shippers for less than the special costs of serving them would be plainly unfair to other shippers who would be called upon to make up the deficiency.

§ 473. **Basis of proportionate rate the ton-mile cost.**

The division of the total charges among the various articles of traffic may be upon the basis of the ton-mile; that is, the number of tons carried multiplied in each case by the number of miles carried. If the sum of the whole amount of freight carried amounts to one hundred thousand ton-miles, and the gross revenue required from freight to two thousand dollars, the average rate of freight will be two cents per ton-mile. If there were no other factors in the problem, therefore, a fair proportionate rate would be the ton-mile average charge. Because, however, of other factors, which cause a difference between commodities with respect to the fair charge for carrying them, a uniform ton-mile rate applied to all cases would not result in reasonable particular rates. While it must remain the average rate, each particular rate is likely, in fact, to be pushed above or brought below the average by reason of one or more special circumstances, which must now be briefly considered.

§ 474. **Cost of carriage as a factor affecting particular rate.**

The cost of carriage is a factor which must in fairness be considered in arriving at a particular rate, since it is obviously fair that for a carriage which is unusually expensive a higher than the average rate should be paid. But while a rough estimate of the cost of carriage is to be considered in fixing the particular rate, it will seldom be possible to apportion with any exactness the proportionate share of the burden upon that basis alone.

This general problem came up in a rather difficult form in a recent case before the Supreme Court of Tennessee.[1] The facts in that case were these: A railroad company contracted with a newspaper publisher, agreeing to run a special early morning train carrying only the newspapers of the publisher, in consideration of the publishing company guarantying to it a certain revenue from the operation of the train. This train became one of its scheduled trains, and was advertised as such. It was controlled exclusively by the company, and all the revenue derived from its operation in the carrying of passengers and freight was its property.

The court held that notwithstanding the provisions of the contract the railroad must accept the newspapers of the plaintiff. Upon the troublesome question as to how much the plaintiff must pay for the service, the court had interesting suggestions. The substance of what was decided on that point was that since the railroad company was bound, under its duty as a common carrier, to carry any freight properly tendered to it, neither the railroad nor the house contracting for the service could impose, as a condition of acceptance and delivery of goods tendered, an obligation to share the burden of establishing the service voluntarily assumed by the contracting house.

[1] Memphis News Publishing Co. v. Southern Railway Co., 75 S. W. 941 (1904).

Upon the point of the compensation to be required of the petitioning company, the court found it difficult to state certain rules, expressing their conclusions thus: First, we think it would be impracticable to state an account which would do equal justice to the parties. While it would be easy to ascertain the amount of money expended and the value of the service rendered in fostering this train by cross complainant, yet it would be impossible to ascertain the value of the advantages derived by it from this enterprise. Certainly the worth of this advantage should be taken into account. Second, If bound to contribute at all, we think the Morning News Publishing Company could only be required to do so to the extent of its proportional part of the same, all other shippers who had availed themselves thereof being equally liable to contribution.[2]

[2] The cost of a particular service was held an important factor in making a particular rate in the following cases, among others:

UNITED STATES SUPREME COURT:

Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892), affirming 83 Mich. 592, 47 N. W. 489; Minneapolis & St. L. R. R. v. Minnesota, 186 U. S. 257, 46 L. Ed. 115, 22 Sup. Ct. 901 (1902), affirming 80 Minn. 191, 83 N. W. 60 (1900).

FEDERAL COURTS:

Chicago, St. P., M. & O. Ry. v. Becker, 35 Fed. 883 (1888); Interstate Com. Com. v. Leigh V. Ry., 49 Fed. 177 (1892); Interstate Com. Com. v. Leigh V. Ry., 74 Fed. 784, appeal withdrawn, 82 Fed. 1002, 27 C. C. A. 681 (1897); No. Pacific Ry. v. Keyes, 91 Fed. 47 (1898); Interstate Com. Com. v. Louisville & N. Ry., 118 Fed. 613 (1902); Louisville & W. Ry. v. Brown, 123 Fed. 946 (1903); Tift v. Southern Ry., 138 Fed. 753 (1905).

STATE COURTS:

California—Redlands L. & C. D. W. Co. v. Redlands, 121 Cal. 363, 53 Pac. 843 (1898).

Florida—State v. Seaboard Air Line (Fla.), 37 So. 657 (1904).

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

Massachusetts—Fitchburg Ry. v. Gage, 12 Gray (Mass.) 393, B. &. W. 350 (1859).

Minnesota—Steenerson v. Gt. Northern Ry., 69 Minn. 353, 72 N. W. 713 B. & W. 333 (1897).

See §§ 508-514 *infra*.

§ 475. Insufficiency of the principle of the cost of service.

But cost of service is not the decisive factor in determining a railroad rate, even if it could in all cases be fairly approximated. Indeed, it is doubtful whether it would of itself form any fair test for the fairness of a particular rate. For, in the first place, it must always be impossible to arrive at the cost of a particular carriage. No goods, as a practical matter, are carried by themselves under such circumstances that an exact computation can be made of the cost of carriage; all that can be said is that the carriage of some goods is known to be more expensive than that of others. In the second place, even if such a computation were possible it would not necessarily be fair to make a shipper pay the exact cost of carriage of each shipment. To do so would make the freight vary according to the circumstances of each journey; no man could know what he must pay for any particular shipment, and for similar carriages of the same article two shippers would pay very different charges. Fairness requires that the charge shall be uniform for a certain article carried over a certain route, although the exact cost of carriage may at one time be very much greater than at another. The exact cost of carriage, therefore, or such approximation to it as may be possible, can never be used as the sole or the determining factor in a particular rate. But while the cost of carriage cannot be used by itself to determine a particular rate, neither should it ever be neglected. Considered along with other factors, it should in a general way tend to raise or to lower a particular rate.

Interstate Commerce Commission.

Thurber & N. Y. C. & H. R. R. R., 2 Int. Com. 742, 3 Int. Com. 473 (1890); New Orleans Cotton Exchange v. Illinois C. R. R., 2 Int. Com. 777, 3 Int. Com. 534 (1890); Farrar v. East Tenn. V. & G. R. R., 1 Int. Com. 76; 1 Int. Com. 480 (1888); Brockway v. Ulster & D. R. R., 8 Int. Com. 21 (1898); Gustin v. Atchison T. & S. F. R. R., 8 Int. Com. 277 (1899); Hilton Lumber Co. v. Wilmington &. W. R. R., 9 Int. Com. 17 (1901); Re Proposed Advances in Freight Rates, 9 Int. Com. 437 (1901).

§ 476. **Length of haul as a factor affecting a particular rate.**

The first and most obvious fact which affects the rate is the length of carriage. The further goods are carried, the less, generally speaking, the charge per mile will be, since certain fixed and terminal charges must be paid once and only once no matter how long the haul. As these charges must be paid out of the rate, it is clear that the more miles the goods are carried the less the amount of the fixed charges which must be added to the rate for each mile. "It is a familiar rule in the transportation of freight by railroads, and has become axiomatic, that while the aggregate charge is continually increasing the further the freight is carried, yet the rate per ton per mile is constantly growing less all the time, unless there be exceptional conditions modifying this rule. In consequence of the existence of this rule the increase of the aggregate charge continues to be less in proportion every hundred miles, arising out of the character and nature of the services performed and the cost of the service; and thus it is that staple commodities and merchandise are enabled to bear the charges of transportation from and to the most distant portions of our country." [3]

[3] Farrar v. East Tenn., V. & G. R. R., 1 Int. Com. Rep. 764, 1 Int. Com. 487 (1888).

Length of haul is plainly an important factor in establishing particular rates; in the following citations this point is emphasized:

UNITED STATES SUPREME COURT:

Texas & P. Ry. v. Interstate Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666 (1896); East Tenn., V. & G. Ry. v. Interstate Com. Com., 181 U. S. 45 L. Ed. 719, 21 Sup. Ct. 516 (1901).

FEDERAL COURTS:

Interstate Com. Com. v. Louisville & W. R. R., 73 Fed. 410 (1896); Matthews v. Board of Corp. Comm'rs., 106 Fed. 7 (1901); Interstate Com. Com. v. Louisville & N. R. R., 118 Fed. 613 (1902); Tift v. Southern Ry., 138 Fed. 753 (1905).

STATE COURTS:

Florida—State v. Seaboard Air Line, 37 So. 658 (1904).

Kentucky—Louisville & W. Ry. v. Com., 21 Ky. L. Rep. 232, 51 S. W. 154 (1899).

§ 477. Modification of the principle of the length of haul necessary.

In a case of this sort,[4] Mr. Commissioner Bragg said: "The length of the haul is however only one factor in the problem; and its effect may be modified or entirely neutralized by other considerations. The natural check, so to speak, on the operation of length of haul is the difficult character of the country through which the longer haul is carried on, making operation more expensive, and thus neutralize the advantage derived from the longer haul.

"The conditions of transportation are very unfavorable. The cost of transportation is much greater. The volume of business is light. Local rates graded according to distance are largely a result of the situation. The subject of comparing rates in one portion of the country with rates in another, and rates upon one line with rates upon another operated under substantially different circumstances and conditions, has repeatedly been before us, and we have uniformly held that they do not constitute a fair basis of comparison."

For this or some similar reason, the rule that the rate per ton-mile diminishes in proportion to the length of the haul must continually be modified by other circumstances of various sorts. "The rule that the rate per ton per mile must be less for the greater distance is one of the tests by which the rates can be carefully scanned in themselves. It is, however, like looking at them with a microscope. It ignores all other tests except that

Minnesota—State v. Minneapolis & St. L. R. R., 80 Minn. 191, 83 N. W. 60 (1900).

Mississippi—Alabama & V. Ry. v. Com., 38 So. 356 (1905).

Interstate Commerce Commission:

New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. R., 1 Int. Com. 764 (1888); Business Men's Assoc. v. Chicago & N. W. R. R. 2 Int. Com. 48, 2 Int. Com. Rep. 73 (1888); Trammell v. Clyde S. S. Co., 4 Int. Com. 120, 5 Int. Com. 324 (1893); Cordele Machine Shop v. Louisville & N. R. R., 6 Int. Com. 361 (1895); Hilton Lumber Co. v. Wilmington & W. R. R., 9 Int. Com. 17 (1901).

which it alone furnishes. It ignores all surrounding circumstances and conditions and every factor of every kind and description that enters into the making of the rate, no matter how compulsory or imperious that factor may be. It serves in itself a valuable purpose, not only as a close test of what a rate really is, but also as a basis in the cases to which it can be made to justly apply as a rule; but to determine the reasonableness and justness of a rate, all surrounding circumstances and conditions, and the factors which enter into the making of the rate, if there are any that are compulsory or imperious, must be considered as well as the rights of the shipper." [4]

§ 478. Volume of traffic as a factor affecting the particular rate.

As the volume of traffic increases, the particular rate tends to diminish. All fixed charges, and other expenses (like station expenses, salaries, and even to a certain extent wages, which are the same whether much or little freight is carried), must be paid largely out of the freight rates, and the greater the traffic, the less each separate article must bear. It is a general principle, therefore, that a large volume of traffic tends to lower the particular rate. This fact is the basis of a theory sometimes held, which may be described as the law of increasing returns. Traffic to a certain amount is necessary, at a given rate, to pay fixed charges and operating expenses; when that amount of traffic is obtained, further shipments will net a profit even if they pay a low rate. It is therefore inferred that fairness permits a higher charge upon the goods which must be carried, and a lower charge to attract additional traffic, which might not otherwise be obtained. This theory, however, if pressed to its logical result, will result in unfairness. Neither the cost to the carrier nor the value to the shipper is affected by such considerations. The

[4] Bragg, Com. in Business Men's Assoc. v. Chicago, S. P., M. & O. R. R., 2 Int. Com. Rep. 41, 47, 2 I. C. C. Rep. 52 (1888).

unfairness is obvious of any rule which would result in an arbitrary difference of charge to two persons requiring identical service; it would not satisfy the shipper who had first offered goods for shipment to be told that his competitor, who had offered goods afterwards was given a lower rate because the law of diminishing costs justified the making of a lower rate to the second comer.[5]

§ 479. **Limitation upon the law of increasing returns.**

That the law of increasing returns cannot be carried too far in rate making has been pointed out many times by those who deal with this question from the legal standpoint. The general caution with which this principle is admitted may be seen by a quotation from the Interstate Commerce Commission: "In many parts of the country railways charge less for transporta-

[5] Volume of traffic as affecting rail making is mentioned oftentimes, see for examples:

UNITED STATES SUPREME COURT:

Lake Shore & M. S. v. Smith, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. 565 (1899), reversing 114 Mich. 460, 72 N. W. 328; Minneapolis & St. L. R. R. v. Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 901 (1902), affirming 80 Minn. 191, 83 N. W. 601.

FEDERAL COURTS:

Interstate Com. Com. v. Lehigh V. Ry., 74 Fed. 784, appeal withdrawn 82 Fed. 1002, 27 C. C. A. 681 (1897); Atlantic & P. Ry. v. U. S., 76 Fed. 186 (1896); Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683, B. & W. 342 (1898); No. Pacific Ry. v. Keyes, 91 Fed. 47 (1898); Matthews v. Board of Corp. Comm'rs, 106 Fed. 7 (1901).

STATE COURTS:

Florida—Pensacola & A. R. R. v. Florida, 27 Fla. 403, 5 So. 833 (1889).

Minnesota—Steenerson v. Gt. Northern Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897).

Mississippi—Alabama & V. Ry. v. Railroad Com. (Miss.), 38 So. 356 (1905).

North Carolina—No. Car. Corp Com. v. Atlantic C. L. Ry. (N. C.), 49 S. E. 191 (1904).

INTERSTATE COMMERCE COMMISSION:

National Hay Assn. v. Lake S. & M. S. Ry., 9 Int. Com. 264 (1902); Re Advances in Freight Rates, 9 Int. Com. Rep. 382 (1902).

tion to a more distant than to a nearer intermediate point. For example, the carload rate on bar iron is 75 cents from New York to Los Angeles, while to Ash Fork, an intermediate point upon the Santa Fe road, nearly 500 miles east of Los Angeles, the rate is $1.90. Carriers justify this adjustment of rates by which Ash Fork is charged two and one-half times as much as is Los Angeles, although the traffic to the latter point passes through the former, by saying that water competition fixes the rate at Los Angeles, and that although the rate is unreasonably low there is some profit in the movement. The railroad itself must be constructed and maintained, with its station-houses and its operating force. These general expenses must be incurred at all events. Any traffic not otherwise coming to the road which pays something above the cost of moving, including rent of engines and cars, cost of fuel and labor, adds to the gross revenues without correspondingly increasing operating expenses.

"The Commission does not sanction the extent to which this principle is often pressed in the making of relative rates; certainly it does not approve the relation of rates established in the example above cited. There are many limitations to the application of the principle. Additional traffic in reality adds to those expenses which are not in theory affected. It costs more to maintain the track and keep up the operating force of a railroad when transacting a heavy than when doing a light business. The general expenses are higher. Increased tonnage speedily finds its way into the construction account; still up to a point at which traffic can be handled to advantage increase in tonnage at the same rate not only increases gross receipts proportionately, but increases net receipts in a still greater proportion. Within the last few years there has been a remarkable growth in railroad tonnage, and it is quite conceivable that this may add sufficiently to the net income without any advance in the price of transportation. The statement of the above law of increasing returns assumes, of course that the items which enter into operating ex-

penses continue the same. In fact, with increase in traffic has come enhanced cost of almost every item which makes part of the operating expense of a railroad. It is plain that this disadvantage might entirely offset the other advantage. Manifestly the problem admits of no *a priori* solution. The only reliable answer is from the observance of actual results."[6]

§ 480. **Increased volume of traffic causing increase of cost.**

In one case the curious position was taken that rates must be raised because the increase in traffic required a large amount of new construction. In reply to this position the Interstate Commerce Commission said:[7]

"It appeared from the testimony that offerings of traffic are at present extremely large; that all lines are taxed to their utmost capacity, and that some have found it absolutely impossible to handle the amount presented. This is requiring enormous outlay in the providing of additional track facilities and the furnishing of additional equipment; and it is said that rates ought to be increased in view of this large increase in traffic, and the incident expenditures required.

"The idea that increased traffic should raise rates is certainly a reversion of previous notions upon that subject. The first class rate from Chicago to New York is 75 cents per hundred pounds, and the distance is one thousand miles. The corresponding rate from Chicago to the Missouri River, one-half the distance, is eighty cents. Rates generally in western territory are higher than those in trunk line territory, and it has commonly been understood that this was due to the greater density of traffic in the latter section. Without doubt this increased demand upon railways is requiring the expenditure of large amounts, but there is nothing in this which would justify an

[6] Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382 (1902).
[7] Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 38, 427 (1902).

advance of rates so long as that expenditure will add proportionately to the earning capacity of the properties." [8]

TOPIC B—VALUE OF THE SERVICE AS THE BASIS OF RATE MAKING.

§ 481. What the traffic will bear as a factor affecting particular rate.

It is often urged in discussion of the railway rate problem that it is justifiable to make rates according to what the traffic will bear. This again is a factor in the situation undoubtedly; for the management in order to get business enough to carry on its service with economy and profit must make some concessions to the low grade commodities which it will inevitably recoup from the high grade freight. And yet this is clearly a principle which can only be justified under strict limitations. These are well discussed by the Interstate Commerce Commission in the quotation which follows:[1]

"There was the further suggestion running through the testimony of all the witnesses that, after all, a rate was purely a traffic question which could be properly estimated only by traffic and commercial conditions. The real question was said to be, Will the traffic bear these higher rates? One witness distinctly affirmed that no rate was unreasonable under which traffic would move freely, and that since it was for the interest of the carriers to move traffic, there was no probability that these rates were unreasonable, or that unreasonable rates would ever be imposed.

"This idea contains a half truth. With respect to some kinds of traffic the statement is correct. It is for the interest of the railway to create business upon its line, and in the legitimate pursuit of that interest it fosters industries by the making of rates which would not otherwise be put in force. Such rates

[8] See, also, South Yorkshire v. Midland Ry., 10 Ry. & C. T. Cas. 28 (1862).

[1] The quotation which follows is from Re Proposed Freight Rates, 9 I. C. C. Rep. 382 (1902).

are applied to the opening of stone quarries, the mining of coal, the carrying of raw material to the factory, and even of the finished product from the factory. These rates do not always add that much to the total consumption or to the total production, but rather determine at what point the commodity shall be produced; and when once the differentials between different markets of consumption and supply have been determined, as at present they generally are in this country, any general increase in rates would not correspondingly limit, or any general decline quicken, the total movement of traffic. Still, the tendency of low rates is to stimulate business and in case of many rates the self-interest of carriers may be safely relied upon to prevent unjust exaction."[2]

§ 482. Essential defects in the principle of charging what the traffic will bear.

Any considerable concession to the principle of charging what the traffic will bear is dangerous. The public service company is acting primarily for the benefit, not for the exploitation of the public. To allow a carrier, for instance, to charge what the traffic will bear is to foster a continual increase of railroad rates. The problem was concisely and unanswerably stated and discussed by Mr. District Judge Speer in the case of Tift v. Southern Railway.[13] In this case the Southeastern Freight Association, an association including the defendant railways, had raised the freights on lumber from Georgia to the Northwest. At first shipments almost ceased; but with a re-

[2] Charging what the traffic will bear is not held a proper basis for rate making by the judicial courts. See Tift v. Southern Ry., 138 Fed. 753 (1905); Brunswick & T. W. D. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

And the railroad commissioners give it little scope. See Re Rates on Food Products, 3 Int. Com. Rep. 98 (1890); Re Advances in Freight Rates, 9 I. C. C. Rep. 382 (1902).

See §§ 523-529 *infra*.

[3] 138 Fed. 753 (1905).

vival of business they began again; and the fact of the large shipments was relied upon to show that the new rates were not unduly high. The court said: "A great demand for yellow pine lumber had grown up in all sections. Builders felt themselves obliged to have it, whatever the price, and whatever the rate, and large shipments were made on the advance rates. This is plainly enough shown by the numerous supplemental affidavits offered by the complainants and received as evidence. This, however, was in no sense ascribable to the action of the Southeastern Freight Association in imposing this rate, but was despite that action. It in no sense relates to the reasonableness or unreasonableness of the rate. And it should not be forgotten that while the business of the lumbermen was recuperating the treasuries of the railroads were all the while receiving a proportionate increment from the unreasonable increase of rates which they had imposed. They have no right to graduate their charges in proportion to the prosperity which comes to industries whose products they transport. With equal reason they might demand an increase of rates for the transportation of cotton with every increase in the value of our great staple. Indeed, to concede the principle for the fixation of rates upon which the railroads through the medium of the Southeastern Freight Association have acted in this case would concede their power to levy for no better service augmentation of tolls for every increase of profit in every line of endeavor won by the enterprise, sagacity, and industry of the American people. It is superfluous to add that a government of law, and not of men, will never tolerate such domination and control of the trade, manufactures, and commerce of the American people."

§ 483. Making rates compared with levying taxes.

It is a common statement in the discussion of rate making that the situation is the same as in the levying of taxes. This may be used as a figure of speech but it is loose talk at best. There is a certain truth in the principle of charging more

against valuable goods than against cheap goods, as has been conceded; but that the carrier can, in analogy to taxation, throw the burden upon the more valuable goods and relieve the cheaper goods in direct proportion to their respective values cannot be admitted. The duty of the carrier is to move all goods at a reasonable price for the service rendered, a matter not to be determined upon any *ad valorem* basis. The wrong to the public in making what the goods will bear the basis of rates is well pointed out in the succinct quotation which follows: "It is not a question of what the traffic will bear, but rather of what the public should bear. Conditions are such that this rate *can* be advanced as between the people who pay it and the stockholders who receive it. Is the advance right? Every question as to the reasonableness of a rate may present itself in two aspects. First, is the rate reasonable, estimated by the cost and value of the service, and as compared with other commodities? second, is it reasonable in the absolute, regarded more nearly as a tax laid upon the people who ultimately pay that rate? The considerations which determine the first of these aspects are of but little weight in determining the second. Every such inquiry involves the idea of some limit beyond which the capital invested in railways ought not to be allowed to tax other species of property. What is that limit, and how can it be fixed?"[4]

§ 484. Rates may be shown to be unreasonable in themselves.

Occasionally a case will come up when the competition between the principle of protecting the carrier in its fair return and the principle that no more than a reasonable charge should be exacted from the shipper is not a difficult issue to decide. For sometimes the unreasonable character of the charge exacted will be so apparent that the case for the shipper will be unaffected by the most skillful argument for the carrier. Thus

[4] Re Advances in Freight Rates, 9 I. C. C. Rep. 382 (1902).

in one case under examination by the Interstate Commerce Commission,[4a] the railroad company met the charge that the rate established was unreasonable by attempting to show that they were earning no more than a fair return. But the Commission, in holding for the complainant, seized upon the obvious fact that the rates were plainly unreasonable in themselves. On that point it was said: "In the fiscal year which had just closed when this proceeding was commenced, the average rate received by the railway companies of the United States for hauling one ton of freight one mile, was less than 1 cent. The average received by the railway companies, including the defendants, operating in the territorial group composed of the States of Arkansas, Missouri, Kansas, parts of the States of Colorado and Texas, and Indian and Oklahoma Territories, and part of the Territory of New Mexico, was less than 1.2 cents. The Eureka Springs Railway Company received more than 10 cents per ton per mile, which is about nine times the average amount received by the railway companies operating lines in said States and Territories so grouped, because of similarity of, or in respect to, density of population, topography and nature of the country, character of industries served by railways, and other characteristics affecting the question of the cost and reasonable compensation for railway service."[5]

[4a] Cary v. Eureka Springs Ry., 7 I. C. C. Rep. 286 (1897).

[5] A rate unreasonable in itself to the person served cannot stand. See:

UNITED STATES SUPREME COURT:

Union Pac. Ry. v. Goodridge, 149 U. S. 680, 37 L. Ed. 896, 13 Sup. Ct. 970 (1893), affirming 37 Fed. 182; Covington & L. T. R. Co. v. Sandford, 164 U. S. 596, 41 L. Ed. 561, 17 Sup. Ct. 198 (1896), reversing 20 S. W. 1031; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming 64 Fed. 165; Minneapolis & St. L. R. R. v. Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 901 (1902), affirming 80 Minn. 191, 83 N. W. 60.

FEDERAL COURTS:

Wells v. Oregon Ry. & H. Co., 15 Fed. 561 (1883); Interstate Com. Com. v. Louisville & N. R. R., 118 Fed. 613 (1902).

STATE COURTS:

§ 485. Adjustment between the claims of the company and the patron.

It may be that a public service company cannot obtain a fair return on its investment without charging more than a fair amount for the particular service. This will not usually happen: there will usually be some ground left between the limit of reasonable return and the limit of value of the service. As Mr. Justice Savage said in Kennebec Water District v. Waterville:[6]

"In some of the cases to which we have referred, it is suggested that there may be instances where these two principles will clash,—where public service rendered at rates not higher than the service in itself is worth may produce less than a fair income, or no net income at all. But we assume that it is unnecessary to discuss this question here, for neither upon the face of the bill and answer, nor in the requests for instructions, nor in the arguments of counsel, is there any suggestion that what will be reasonable rates for the public in this case will not also be reasonable rates for the company."

Where, however, the question is approached from the opposite standpoint, and the court has found that a schedule of rates charged by the company does not of itself bring in more than a reasonable return to the company, it may be necessary to cut down this maximum permitted rate by considering the rights of the individual served. That is, in determining what are reasonable rates, the fact that a road earns little more than operating

California—Spring Valley W. W. v. San Francisco, 82 Cal. 286, 23 Pac. 910 (1890).

Maine—Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

See §§ 515-521, *infra*.

INTERSTATE COMMERCE COMMISSION:

New Orleans C. Ex. v. Cincinnati, N. O. & T. P., 2 Int. Com. Rep. 289, 2 I. C. C. Rep. 375 (1899); Cary v. Eureka Springs Ry., 7 I. C. C. Rep. 286 (1897).

[6] 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

expenses is not to be overlooked, but cannot be made to justify grossly excessive rates. Thus, wherever there are more roads than the business at fair rates will remunerate, they must rely on future earnings for a return of investments and profits.[7]

§ 486. Equalization of advantage as a factor affecting the particular rate.

A theory of fixing rates which appeals to many economists, which is in fact a modification or special application of the rule for charging what the traffic will bear, is the theory that rates should be so fixed as to equalize the advantage of shippers and thus establish the conditions of business for the good of the whole country. It is in substance a sort of legal protection to struggling industries. Thus if wheat cannot be raised in Wyoming as cheaply as in Iowa, the rates from Wyoming to the seaboard should be correspondingly reduced; unless indeed it does not seem to the rate-fixers to be for the country's good that wheat should be raised in Wyoming. A practical objection to this doctrine will at once appear. It calls on the private individuals who happen to have power over rates to act in such a way as to subserve the public good, rather than their own advantage; and thus without election as legislators and without the responsibility of office, to perform one of the most difficult of legislative functions. Nor is it practically possible to fix rates entirely or principally on this theory. As Mr. Commissioner Veazie well said:

"The complainants have advanced the theory that the Commission in fixing these relative rates should be governed by commercial considerations wholly, independent of the cost of carriage. It was said by Mr. Squire, one of the complainants, in his testimony, that railroads should make just relative rates so

[7] New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co., 2 Int. Com. Rep. 289, 2 I. C. C. Rep. 375 (1888); Rice v. Western New York & P. R. Co., 2 Int. Com. Rep. 298.

that both parties could live, and that the product rate should be higher than the live-hog rate, even if the cost of transporting the two articles be the same, which is not the case. It is to this theory that the complainants have very largely directed the attention of the Commission. A rate which is based upon this theory would have to vary in the case of the live hogs with every change in the market price of the animals in the western markets.

"Rates for the transportation of property should be arrived at and based so far as practicable upon permanently continuing, fixed facts and conditions. The fluctuations of the markets of the country are so frequent, especially as to competitive articles, and oftentimes unexpected, that commercial considerations alone would not furnish a sufficiently stable and fixed rule for guidance in making a rate which ought to remain substantially permanent through all fluctuations. Upon this point so strenuously urged by the complainants that carriers should adjust their rates in a way to produce equality between the competitors in all markets, it must be apparent that it would be a useless task for the Commission, even if it had the power, to attempt to accomplish such a result. It would involve a careful research into all the circumstances surrounding the business of each locality, as questions of rent, rates of taxation, cost of labor, and many other things which suggest themselves. The evident result would be that there would have to be as many differently constructed rates as there are different localities." [8]

§ 487. Carriers not obliged to equalize disadvantages.

But while the equalization of advantage cannot be a chief factor in rate-fixing, it may legitimately be considered as one of the subordinate factors tending to lower the particular rate, and may be taken into account with the other factors enumerated in this chapter.[9]

[8] Squire v. Michigan Central Ry., 3 Int. Com. Rep. 515, 4 I. C. C. Rep. 611 (1891).

[9] Equalization of advantages is discussed in §§ 538-542, *infra*.

It is plain that a railroad company may have nothing to do with the principle of equalization, and shippers whose original disadvantages remain have no legal redress. "The complainants introduced considerable testimony to show the cost of producing corn and wheat in northwest Iowa, for the purpose of demonstrating that at the present rate it was not possible for the farmer in that section to embark in this industry at a profit. Very little has been said in reference to this aspect of the case upon the argument, and probably very little could be consistently said. If the farmer cannot, in a given locality, raise and ship produce to market at a profit upon the existing freight rate, that is usually no reason why the carrier should be compelled to accept less than a reasonable sum for its service." [10]

§ 488. **Competition as a factor affecting the particular rate.**

But while the "law of increasing returns" cannot be pressed too far, it contains an element of truth which may be considered in fixing a particular rate. If traffic may be acquired by a specially low rate which would otherwise be lost, to acquire the traffic would benefit rather than burden other traffic of a different kind, since if under the law of increasing returns it is remunerative, the profit thus earned will tend to diminish the rates charged on the remaining traffic. On this ground competition may be considered as a factor in fixing rates. If a carrier is carrying goods from two stations, at one of which there is competition, the rate at the station where the competition exists may fairly be reduced, so far as is absolutely necessary to secure the traffic, provided the reduced rate remains a remunerative one under the law of increasing returns. If the rate were not reduced, *ex hypothesi,* the traffic would be lost, and the profit realized upon it must be exacted from the non-competitive traffic; if on the other hand the rates were reduced equally all over

[10] Prouty Com. in Grain Shippers' Assoc. v. Illinois Cent. R. R., 8 I. C. C. Rep. 158 (1899).

the road, the carrier could not earn a fair return from his whole schedule, since we are assuming that the necessary competitive rate is so low as to be profitable only as a result of the law of increasing return. The same result will follow if the competition affects not a particular station but a particular class of goods. It is therefore always fair even to the shipper who does not get the benefit of the competition to consider competition as a factor in reducing the rate.[11]

§ 489. **Conclusion as to proportionate rate.**

As a result of these considerations, the conclusion may be drawn that a proportionate rate must be established for each article of traffic. This rate will be fixed according to the share of the entire burden of charge which ought reasonably to be borne by that particular article. In determining the reasonable share of the burden to be borne by an article, various considerations must be weighed, and the rate when finally established will be determined as a result of all such considerations. It must be clear, therefore, that the establishment of the particular rate is not, like the establishment of the general schedule of charges, a matter which can be tested by a mathematical formula. The division of rates among the particular commodities involves judgment and experience; it is not an exact division, but only the closest possible approximation to fairness.

Thus in speaking of the requirement of the Federal Interstate Commerce Act of 1887, section 1, that rates should be reasonable and just, the Interstate Commerce Commission has said: "The words 'reasonable' and 'just' as used in the Statute, as applied to rates, are each relative terms. They do not mean to imply that the rates upon every railroad engaged in interstate commerce shall be the same or even about the same. The conditions and circumstances of each road surrounding the traffic and which enter into and control the nature and character

[11] Competition as a factor is discussed in §§ 530-537, *infra*.

of the service performed by the carrier in the transportation of property, such as the cost of transportation, which involves volume or lightness of traffic, expenses of construction and of operation, competition in some respects of carriers not subject to the Law, rates made by shorter and competing lines to the same points of destination, space occupied by freight, value of freight and risk of carriage to carrier, all have to be considered in determining whether a given rate is 'reasonable' and 'just.'" [12]

§ 490. Classification the method of establishing the particular rate.

The division of rates is accomplished by the classification of all articles into certain groups, and then fixing the rate for each group. In classification, as will be seen, all the factors which have been discussed are considered; and it is by affecting the classification that such factors usually influence the particular rate. The classes having been established, it is necessary next to determine the difference of rate between the classes, which may be effected by establishing a certain proportion between the various class rates. Finally, it remains to fix the charge according to the length of journey; and this may be done by fixing the rate between individual stations, or by grouping the stations, and fixing the rate with reference to an entire group.

§ 491. All factors enter into the determining of a particular rate.

A particular rate thus is a resultant of many factors. While there are certain economic forces which must be recognized as playing a legitimate part in the establishment of a particular rate, it is the office of the law to interfere to prevent the working out of these forces in an oppressive way. For experience

[12] New Orleans Cotton Exchange v. Illinois Cent. R. R., 2 Int. Com. Rep. 777, 3 I. C. C. Rep. 534 (1890).

has shown that the regulation of rates cannot be safely left to natural processes, but the law must often be called upon to prevent the distribution of the burden of rates in a disproportionate manner. But in a conservative handling of the rate problem, these economic conditions are taken into account and allowed some scope. Thus in one proceeding in passing upon rates upon corn, the Interstate Commerce Commission said:[13] "What part of the whole burden of maintaining the roads must the corn pay? How much shall be apportioned to corn and agricultural products and how much to the machinery used? How much on the necessaries and comforts used? We think no better rule applicable to the matter under investigation than that applied by railroads themselves, in accordance with which rates are so adjusted as to secure the largest interchange of commodities. This rule is approved by its frequent application in the movement of western grain through the voluntary action of the roads. Put such a rate on corn as will encourage and warrant its movement if such a rate is fairly remunerative. While rates should not be so low as to impose a burden on other traffic they should have reasonable relation to cost of production and the value of the transportation service to the producer and shipper. In the carriage of the great staples which supply an enormous business, and which in market value and actual cost of transportation are among the cheapest articles of commerce, rates yielding moderate profit are both justifiable and necessary. The rates which we have determined upon as reasonable have been arrived at on this basis."

[13] Re Rates upon Food Products, 3 Int. Com. Rep. 93 (1890).

CHAPTER XVII.

LEGAL LIMITATIONS UPON MAKING PARTICULAR RATES.

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TOPIC A—CERTAIN LIMITATIONS FUNDAMENTAL.

§ 500. **Rates must be fair to the company and to the public.** The fundamental principle as to the reasonableness of a particular rate is that it should be fair compensation for the service rendered. There are, therefore, limits within which the railroad company must act in fixing its rates. The company must have reasonable compensation; but the shipper must not be charged more than a reasonable price. The compensation,

in order to be reasonable, must be fair to both parties.[1] It is not enough that the whole schedule shall bring in a fair return to the company; the particular rate fixed for carriage must be in itself no more than a reasonable amount for the customer to pay under the circumstances, for the service rendered him. The question of reasonableness involves the element of reasonableness both as regards the company and as regards the public.[2]

§ 501. Limitations within which rates must be made.

Stated in more accurate terms, the law requiring fair compensation has two distinct sides. It is desirable that the carrier should receive the full cost to it of performing the service. It is desirable, also, that the shipper should not pay more than the value of the service to him. These two limitations are

[1] Harlan, J., in San Diego L. & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804 (1899); Brewer, J., in Cotting v. Kansas City S. Y. Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30 (1901).

[2] See §§ 281, 289, 291, 292, 295, 441, 455, *supra*, and cases cited in the footnotes to those sections. The best discussion of the general principles is in:

United States—Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418, B. & W. 347 (1898), affirming 64 Fed. 165; Minneapolis & St. L. R. R. v. Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 901 (1902), affirming 80 Minn. 191, 83 N. W. 60; Southern Pacific Ry. v. Railroad Commrs., 78 Fed. 236, B. & W. 322 (1896); Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683, B. & W. 342 (1898); Matthews v. Board of Corp. Commrs., 106 Fed. 7 (1901); Interstate Com. Com. v. Louisville & N. R. R., 118 Fed. 613 (1902); Tift v. Southern Ry., 138 Fed. 753 (1905); Interstate Commerce Commission v. Chicago G. W. Ry., 141 Fed. 1003 (1905).

Arkansas—Missouri Pac. Ry. v. Smith, 60 Ark. 221, 29 S. W. 752 (1895).

Florida—State v. Seaboard Air Line (Fla.), 37 So. 658 (1904).

Massachusetts—Fitchburg Ry. v. Gage, 12 Gray (Mass.), 393, B. & W. 354 (1859).

Mississippi—Alabama V. Ry. v. Railroad Commrs. (Miss.), 38 So. 356 (1905).

Minnesota—Steenerson v. Gt. Northern Ry., 69 Minn. 353, 72 N. W. 713 (1897).

North Carolina—Corporation Commission Railroad, 139 N. C. 126, 49 S. E. 191 (1905).

obviously at the extremes within which in normal cases rates must be made.

"The cost of service, while recognized as an important element in classification and rates, is not alone controlling. On that basis some articles, on account of relation of commercial value to cost of service, though furnishing a large volume of traffic, would not be carried at all, and others of high commercial value would have a very low rate without increasing tonnage.

"Another element of the highest importance, and that cannot be disregarded, is the value of the service to the article carried. This is a factor that largely determines the classification and rates the article will bear in the transactions of commerce, and necessarily qualifies the influence of other factors in the distribution of charges with the view to average reasonable revenue." [3]

§ 502. Unreasonable regulation forbidden.

The company performing the service should be protected, as has been seen in former chapters, in getting as a reasonable return for its services, the cost of those services as a minimum. This, however, cannot always be done; in such a case the utmost protection possible must still be given to the company. The balance of interests was well stated by the Interstate Commerce Commission thus: "It is vitally important to the development of this country that the service performed by our railways should be efficient and complete. The wealth invested in these enterprises should be sacredly protected, and no unnecessary burden should be imposed in the way of public supervision. But it is equally important that the rates charged for the service should be just; and, in view of the monopolistic conditions under

[3] Schoonmaker, Commissioner in Thurber v. N. Y. C., 2 Int. Com. Rep. 742, 3 I. C. C. Rep. 473 (1891).

which these rates are now made, the public has no protection save by regulation by the Government." [4]

§ 503. Value of the services constitutes maximum limit of charge.

The value of the services to the customer constitutes the limit of charge which the company is permitted to make. Considering all the circumstances, if the services have a certain value to the consumer and no more, the carrier must charge no more. "The elemental principles thus far noted may be summarized as, on the one hand, the right of the company to derive a fair income, based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation, and current operating expenses; and, on the other hand, the right of the public to have no more exacted than the services in themselves are worth.

"While the company is entitled, so far as this case shows, to a fair return upon the value of the property used for the public at the time it is being used, the public (that is, the customers) may demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but as individuals. The value of the services in themselves is to be considered, and not exceeded. These views seem to be consonant with reason. They are also established by the highest judicial authority in our country." [5]

[4] Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382, 437 (1903).

[5] Savage, J., in Kennebec Water District v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902), citing Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819 (1898); San Diego Land & Town Co. v. National City, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154 (1899); Covington & L. T. R. Co. v. Sanford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560 (1896).

§ 504. **Company cannot make unreasonable rates.**

The requirement that no person may be charged more than a reasonable rate may be insisted upon although the result is that the company does not get a fair return from its schedule as a whole. Those who undertake a public employment enter upon a business affected with a public interest, which justifies the State in demanding that the rates charged shall be reasonable to the public.

A test case upon this point was Missouri Pacific Railway v. Smith,[6] where maximum rates were fixed by the Legislature which the plaintiff railway company claimed would cut off all the profits of their business. The court held that this was not fatal to the constitutionality of the legislation; Mr. Justice Thomason saying:

"The additional fact that the traffic and business of the road, when operated according to the act of April 4th, and no passenger was charged exceeding 3 cents a mile, would not pay the interest on the debts of the railway company and the expenses of operating the road, does not show that the maximum passenger rate of 3 cents a mile is unreasonable. Rates of transportation sufficient to enable the road to realize a sum large enough to defray current repairs and expenses and pay a profit on the reasonable cost of building the road and equipping it, ought to be reasonable. The earnings of a road might be sufficient for this purpose, and yet not large enough to pay expenses and interest on its debts. Large and unnecessary debts might have been contracted through extravagance, enormous salaries, and mismanagement, exceeding the cost of building and equipping the road, and bearing a rate of interest amounting to more than a a reasonable profit on the capital necessary, when judiciously expended, to construct and equip the road. Like some individuals as to their business, railway companies can reach a point through extravagance, losses and mismanagement, when no rea-

[6] 60 Ark. 221, 29 S. W. 752 (1895).

sonable rate of profit will enable them to maintain their roads and pay the interest upon their debts, and when failure and a sale of the road to other parties become inevitable." [7]

§ 505. Reasonable rates not necessarily profitable.

In another case [8] of much the same sort, much the same language was used, Mr. Justice Carter of Florida saying: "The returns attempt to question the reasonableness of the rates established by the Railroad Commissioners. They contain certain allegations that the rates are not just and reasonable, but these general allegations are qualified by other statesments that the rates, if enforced, will not afford a reasonable income, or in fact any net income over and above the reasonable cost of constructing and maintaining said railroads. The original return goes further, and includes with the cost in construction and maintenance the payment of fixed charges, which counsel admitted in argument means taxes and interest on outstanding bonds. The vice in this method of pleading lies in the fact that the question of reasonableness is made to depend upon the capacity of the rates to yield a net income over and above the cost of constructing and maintaining the road and the payment of fixed charges, whereas circumstances may exist under which rates are reasonable which do not afford a net income above the cost of operation and taxes, or the cost of operation, taxes and fixed charges. The returns set forth a few elements entering into the question as to what constitutes a reasonable rate, and attempt to make these elements controlling; whereas the conditions surrounding the operation of the road may deprive them of controlling force."

[7] See the discussion of this principle in §§ 484-485, *supra*, and cases cited therein.

[8] State v. Seaboard Air Line, 37 So. 314 (Fla.), (1901), per Carter, J.

§ 506. Company cannot justify exorbitant profits.

On the other hand, it is certain upon fundamental principles that the company cannot justify exorbitant profits by urging that the rates are reasonable in themselves. At first impression this has seemed to some persons unjust to the company; but it should be remembered that the company is still allowed a fair return upon its reasonable capitalization, which is all the right that those who have entered upon these enterprises have by established law. If it is found that rates may be reduced to a point which seems below the reasonable standard and yet produce a fair return, the company has no legal grievance if it is not permitted to charge higher rates. To quote a specific illustration:

"The rate per ton mile, while often instructive, is not by any means a fair index of a reasonable rate. The cheapest traffic is frequently the most profitable to the carrier. For the year ending June 30, 1901, the average receipts per ton mile upon all kinds of traffic over the Chesapeake & Ohio System, embracing about 1,500 miles, was 3.88 mills. The percentage of operating expenses was 62.87—much below the average of the whole United States and among the very lowest. Its net earnings were $3,656 per mile, equivalent to 6 per cent. interest on $60,000 per mile—just about the average capitalization of all our railroads. This example is referred to as showing that business may be profitably done at astonishingly low rates. Indeed, it is usually a question, not of the absolute rate, but of the conditions under which the traffic is handled." [9]

§ 507. Application of these principles to passenger fares.

A railroad commonly maintains two distinct services as it is generally a common carrier of both passengers and goods. Of course the most important part of its business, from an economic point of view, is its freight traffic, but the passenger

[9] Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382, 396 (1902).

business is by no means so inconsiderable a factor as some writers would lead one to think. A railroad company can certainly estimate from experience what proportion of its receipts may be expected from its freight and what from its passenger traffic. What proportion of the expense of operation is attributable to freight traffic and what to passenger traffic is very difficult to approximate; but here, again some of the special costs of handling passenger business may be known and in the roughest manner possible the fixed charges can be apportioned to the respective items in proportion to their volume. It is not claimed that this is in the least exact, but it is submitted that by some such computations it may be told whether the railroad is charging outrageous passenger fares, throwing upon this class of its business unreasonable burdens.

TOPIC B—BASING RATES UPON COST OF SERVICE.

§ 508. Difficulties in dividing joint costs.

It is practically impossible, as has been admitted, to divide accurately to each item of traffic its proportionate share of the total expenditures—capital charges and operating expenses. The expenditures constitute joint costs for all the items of traffic; and the result is that it cannot be said with any degree of accuracy that a certain shipment has cost so much to transport. But this is more particularly true of apportioning capital charges than it is of estimating expenses of movement. And upon the whole, it is not altogether impossible to say of a particular rate that it is much greater than the cost of performing the service. This possibility is discussed in the sections which immediately follow.[1]

"It is manifestly quite as important on public grounds that the citizens who furnish a carrier with business from the pursuits in which they are engaged should not be oppressed with

[1] Cost of service as a delivering factor in railroad rates is discussed in §§ 472-480, *supra*. See the cases cited in the notes to those sections.

rates that are disastrous to their pursuits, as that a carrier should not be required to perform its service at a loss. The public good requires that benefits as well as burdens shall be justly distributed, and that one interest shall not profit unduly at the expense and to the serious prejudice of another. This is the spirit of the Law. A carrier has the peculiar advantage of being able to apportion its aggregate expenses upon its whole business, but a grower of fruit, or of grain, or a manufacturer, cannot do so. The product he markets must alone bear the transportation expense, and if this is excessive and deprives him of any return upon his investment or from his labor or skill, his business is ruined and a public injury is sustained. The equitable rule doubtless is that rates should bear a fair and reasonable relation to the antecedent average cost of the traffic as delivered to the carrier for transportation, and the average market price the freight will command, or, as it is termed, the commercial value of the property." [2]

§ 509. Cost of service different for different railroad systems.

It must be obvious from all that has been said, that cost of service is a relative matter, different for different railroad systems. Upon some systems there will be grades, upon others none. Some are great systems with all the economies of large businesses, while others may conduct small systems through sparsely settled territory. To quote a specific instance from an opinion of the Interstate Commerce Commission: "Tested by these rules, a rate may be a very reasonable and just rate on one railroad and not reasonable and just on another. For example, a rate that would be reasonable and just on the New York Central & Hudson River Railroad may be so low that it would force the Minneapolis & St. Louis Railway into bankruptcy in less than thirty days; and a rate that might be reasonable and

[2] Delaware State Grange v. New York, P. & N. R. R., 3 Int. Com. Rep. 554, 561.

just on the Minneapolis & St. Louis Railway might be so high that if attempted to be enforced on the New York Central & Hudson River Railroad for thirty days it would practically destroy the business of the latter. This diversity is most observable in the different portions of the country, as, for instance, between lines of railroad in the Southern States or the States of the far west, on the one hand, and the railroad lines of the Middle and Eastern States on the other. Where, however, railroad lines reach the same common points, are located in the same territory, and compete with each other, as well as with other lines for the business of that territory, their rates are, in general much the same, and this is one of the necessities of the situation. Even among the rail carriers where there may be occasional differences in rates that will be found substantially justified by the different circumstances and conditions under which the lines are operated." [3]

§ 510. Cost of service different for different parts of the same system.

The point that the cost of service may be different for different parts of the same system was insisted upon in Interstate Commerce Commission v. Lehigh Valley Railroad Company.[4] It appeared in that case that the Interstate Commerce Commission, upon complaint of a shipper, had adjudged a certain rate upon coal unreasonable. The Commission based its finding upon its deductions from the annual report of the defendant company that the average cost of carrying a ton of coal from the Lehigh anthracite regions to Perth Amboy was 85 cents.

Judge Acheson held that this was an inadequate basis to justify the finding that the particular rate in question was unreasonable; he said: "If the explanation thus given by the counsel for the Commission is a correct statement of the method

[3] New Orleans Cotton Exchange v. Illinois Cent. R. R., 2 Int. Com. Rep. 777, 3 I. C. C. Rep. 534 (1890).

[4] 74 Fed. 784, appeal withdrawn, 82 Fed. 302, 27 C. C. A. 681 (1897). See *ante*, §§ 457, 461.

pursued by the Commission in making its estimate of 85 cents, then, in our judgment, that method is without justification. For, having adopted an estimated average rate of revenue, namely, $1.495, from each ton of coal carried over the 149 miles from the Lehigh and Mahanoy regions to Perth Amboy, the Commission assumed that the expenses of the transportation of coal over this particular branch of the defendant's railroad system was necessarily only the average cost of the carriage of all coal upon the defendant's entire system. The assumption which thus underlies the Commission's estimate is unwarrantable. Merely because the cost of carriage of all coal upon the defendant's entire railroad system from all points of shipment to all destinations was 56 per cent. of the gross receipts from all coal is no reason for concluding that upon a particular line or part of the system the cost of carriage bears the same ratio to the coal receipts from that particular line or part."

§ 511. Cost of service estimated from special expenditures in moving goods.

To a certain extent the entire expense of transporting may be judged from the sums expended in moving the goods. When the average amounts expended in moving quantities of a given commodity is known, a standard is established by which it may be seen whether there is not a full return to the railroad of the entire cost attributable to the transportation of these goods. This method of demonstration was used with good effect in one report by the Interstate Commerce Commission upon the contention of the trunk lines that it would be necessary for them to raise the rate on grain, which was 17 1-2 cents from Chicago to New York, as that rate was unremunerative. The quotation which follows will show how the Commission came to its conclusion that the rate yielded a fair return to the carrier:

"As bearing upon this, certain testimony given in the present investigation by the traffic manager of the Lake Shore &

Michigan Southern Railway as to the cost of moving grain over his line is interesting and instructive. He testified that the standard train upon the Lake Shore road consists of 50 cars, containing 80,000 pounds per car; that the time occupied in hauling this train from Chicago to Buffalo would be 36 hours, and that the cost of movement, including labor of trainmen, coal consumed, oil and waste, rent of engine and of cars, would approximate $260. He gave the items making up this total, which need not be repeated here. The traffic manager of the New York Central Company was unable to give the corresponding figures from Buffalo to New York, but it appeared that a standard locomotive would haul, with the assistance of a helper at one or two points, this train, or an even heavier train, from Buffalo to New York in approximately the same time and at approximately the same expense, the distance being about 100 miles less. The total train expense, therefore, of moving this traffic from Chicago to New York would be $520, while the total revenue derived from it, at 17 1-2 cents per 100 pounds, would be $7,000.

"This estimate of cost does not of course include the entire expense of moving that train-load of grain between those points. The terminal charges are entirely ignored, and these are often heavy. Nothing is allowed for maintenance of way, nor for those other expenses of operation which are chargeable in a measure upon all traffic, but which cannot in the nature of things be exactly apportioned. Again, a part of these cars must be returned empty; still the items which are taken into account, namely; labor of trainmen, cost of fuel, oil and waste, renewals and repairs of engines and cars, make up nearly one-half the operating expenses of the railroad systems under consideration, and it is impossible not to feel, after every allowance has been made, that this traffic, moving under the circumstances and con-

ditions and in the quantities that it does, yields to these carriers a very handsome profit." [5]

§ 512. Rule of proportionality in sharing costs.

As an abstract matter the fairest way to determine the cost of any particular service would be to apportion rateably the total disbursements of every sort to the various items of traffic and so to arrive at proportionate rates. Theoretically, perhaps, any other method is less just to all concerned. In determining what is a reasonable rate for services rendered, it is hardly proper to take the road as existing and as maintained, with its track and terminal equipments, salaries and all other expenses, and to regard as the total cost of any particular service merely the increased expense necessary to add to its business the service in question; truly the cost of that service ought to include its fair share of the interest on investments and of the general expenses.[6]

§ 513. Law of decreasing costs.

It has been pointed out, however, in all discussions of the railroad problem by economists that the fixed expenses, which constitute so considerable a proportion of the disbursements by a railroad, are to a very large extent independent of the amount of its traffic carried.[7] Therefore additional business will always be done at a decreasing relative cost. The net income rises as the business expands, and the law of increasing returns is again demonstrated. This may be shown in a simple formula if it be assumed only one-half of the expenditures of a railroad varies with the traffic. "If it costs x to deal with 1,000,000 units of traffic, 5,000,000 units will cost not $5x$, but $1\text{-}2x +$

[5] Prouty Commissioner in Re Advances in Freight Rates, 9 I. C. C. Rep. 382, 397 (1903).

[6] Dalton v. Boston & A. R. Co., 1885, Mass. Ry. Com. p. 130.

[7] Noyes: American Railroad Rates, p. 19.

$(1\text{-}2x \times 5) = 3x$." [8] How far it is possible to justify by this economic law the making of differences in freight rates is discussed in several places later in this volume.

This rule seems to have been applied in a case before the English Commission.[9] This was an application to determine the amount of the remuneration to be paid per annum by the Postmaster-General to the Waterford Railway Company for the conveyance of mails on their railway: (1) By certain special or notice trains required to be run on notice from the Postmaster-General. (2) By certain ordinary or agreed trains timed by agreement with the Postmaster-General. It was held, that the remuneration for carrying the mails ought not to include any sum directly representing the capital cost of providing the railway; and, further, that the definite sum to be paid should be of sufficient amount—(1) To give the railway companies payment for the mails at their ordinary parcels rate, less a rebate of one-third of it, in consideration of the usual terminal services in connection with parcels being done in the case of the mail parcels by the Postmaster-General; (2) To make up to them, when required, the gross receipts of the notice trains to 5s. per train mile; (3) To compensate them for possible decrease of the receipts of agreed trains due to their times of running being partly fixed to meet postal requirements, the allowance under this head to be a "substantial" one.

§ 514. Cost of service a principle applicable to passenger fares.

Cost of service is plainly a principle in rate making to be applied to passenger fares as well as to freight rates. It cannot be more scientifically done in one case than in the other, but it is always a matter to be inquired into. Various considerations

[8] Acworth: Elements of Railway Economics, p. 50.

[9] The Waterford, Limerick and Western Ry. Co. v. Postmaster-General, 11 R. & C. T. Cas. 77.

affecting the cost of passenger service are suggested in the extract from an opinion by the Interstate Commerce Commission [10] which follows, which held not invalid a fare at 3.826 cents per mile between Savannah and Charleston: "This railway between Savannah and Charleston runs mostly through swamp lands and crosses a number of rivers. From Savannah it runs parallel with the Savannah River, crossing it to the South Carolina side; the other streams crossed are the Coosawhatchie, the Salkehatchie, the Ashepo and the Edisto. Five or more drawbridges are operated. The road had eight miles of trestling, but, by filling in, the trestle mileage has been reduced to four. On account of the swamps and rivers, the construction of the road involved more than ordinary cost, and unusual expense is required to maintain it in a good state of repair. The section traversed by the line is unhealthy, much of it is uninhabitable, and the population is made up almost entirely of colored persons. They have little patches of land, and some are employed in rice cultivation. Up to about three years ago phosphate mines in that region were worked extensively, but that industry has been abandoned to a considerable extent, because, it is suggested, of the discovery of phosphate rock in Tennessee, Florida, and other localities. There is one fertilizer factory located on the line, about 35 or 40 miles south of Charleston. There are no places of importance between the termini of this road, and the counties in South Carolina penetrated by the line (not including Charleston County) number 28 persons to the square mile as against 34 1-2 to the square mile throughout the whole State. After leaving Chatham County, which includes Savannah, the road passes through Effingham County, Ga., which has about 13 persons to the square mile."

[10] Savannah B. of F. & T. v. Charleston & So. R. R., 7 I. C. C. Rep. 601 (1898).

TOPIC C—RATES REASONABLE IN THEMSELVES.

§ 515. External standards of reasonableness.

To a certain extent there are external standards as to what constitutes a fair rate in that community for a given service, so that it might often be possible to say of a particular rate demanded by a particular public service company that it was reasonable or unreasonable in itself. Where there are such standards the rate which the company has established to meet its own policies or necessities must yield something. But does it follow that if the rates of a certain company are no higher than these standard rates that it may justify any profits however large which may result from its business? It would seem that this is a situation where one or the other of the fundamental limitations upon a public service company must be applied, since the public is entitled to protection in either case. Thus no public service company, whatever its necessities, can charge the public more than reasonable rates; while if it is making exorbitant dividends it is not open to it to urge that its rates are not above the ordinary. These propositions, it is obvious, require the further discussion which they receive in the sections which follow.

§ 516. The carrier is entitled to reasonable compensation.

The carrier is entitled to reasonable compensation for his services; and if there is no agreement as to the amount he may recover what the services are worth. Indeed, as has been seen, the conception of common carriage involves the receiving of compensation; and the presumption therefore is that the services of the common carrier are always for hire. This was said succinctly in the leading case of Bastard v. Bastard,[1] the whole report of which follows: "Case against the defendant as a common carrier, for a box delivered to him to be carried to B. and lost by negligence. Williams moved in arrest of judgment,

[1] 2 Shower, 81 (1679).

for that there was no particular sum mentioned to be paid or promised for hire, but only *pro mercede rationabili;* resolved well enough, and judgment given pro plaintiff; for perhaps there was no particular agreement, and then the carrier might have a *quantum meruit* for his hire, and he is therefore as chargeable for the loss of the goods in the one case as the other."

§ 517. Current rates for other transportation.

It would seem that while not the legal measure of proper charge, the current rates for other transportation within the same territory by the company in question or by other companies performing similar services, is evidence which will furnish a test for the value of the particular services in question. This was one of the strongest arguments brought forward in the "Naval Stores Case," [2] to show that the Savannah rates were themselves unreasonable. A part of the language of Judge Speer on this point is quoted to show this method of testing the reasonableness of rates:

"The commission furnishes a tabulated statement which affords much light for the proper determination of the controversy. This shows the rates on uncompressed cotton between numerous points, not on the Pensacola & Atlantic, and Savannah and New Orleans, respectively. The distances vary from 425 miles, from La Grange to New Orleans, to 1,173 miles, from River Junction to New York. The rates in the tables vary from 45 to 65 cents per 100 pounds, and yet the rate from all stations on the Pensacola & Atlantic to Savannah is 66 cents. It is true that some of these rates are from competitive points, but many are from strictly local stations like those on the Pensacola & Atlantic. It also appears from this table that rates on the principal railway lines in the cotton region are materially less than the rates charged from Pensacola & Atlantic stations to Savannah. From 22 local stations in Ala-

[2] Interstate Com. Com. v. Louisville & N. Ry., 118 Fed. 613 (1902).

bama on the Louisville & Nashville the distances to New Orleans range from 265 miles to 411 miles, the rates range from 50 to 60 cents. From 19 stations on the Seaboard Air Line, in North Carolina, South Carolina, and Georgia, the distances to Norfolk range from 366 to 573 miles, and the rates range from 41 to 49 cents. From 13 stations on the Seaboard Air Line in Georgia the distances to Wilmington, N. C., range from 267 up to 413 miles, and the rates range from 38½ to 48 cents. From 19 local stations on the Southern Railway in South Carolina, Georgia, Alabama, and Mississippi the distances to Norfolk range from 434 miles to 1,054 miles, and the rates range from 38 to 61 cents. This comparative statement might be extended. In every instance the average distance on the roads last mentioned to the point of destination is much greater than the average distance from Pensacola & Atlantic stations to Savannah, and yet the rate is invariably much less. We find that it costs more to ship cotton from River Junction to Savannah, 259 miles, than it does to ship cotton from Sneads, a station on the Pensacola & Atlantic, 6 miles from River Junction, to New York, a distance of 1,173 miles, or from the most distant point in Mississippi to Norfolk, 1,154 miles. The facts ascertained by the commission and herein set forth are of the highest significance. In the absence of satisfactory reply by the respondents, they must control the action of the court." [3]

§ 518. **Evidence inadmissible unless conditions are similar.** This comparison cannot be made, however, without considering dissimilar conditions; and conditions may be so dissimilar that no comparison would be proper. Thus in the case of Hooper v. Chicago, Milwaukee and St. Paul Railway,[4] Mr. Justice Kinne said: "Evidence was admitted as to the charges

[3] See, also, Freight Bureau v. Cincinnati, N. O. & T. R. Ry., 6 I. C. C. Rep. 195 (1894); Evans v. Union Pacific Ry., 6 I. C. C. Rep. 521 (1896).

[4] 91 Iowa, 639, 60 N. W. 487 (1894).

made by defendant in other States, but the court excluded evidence as to rates charged by other companies in other States and other roads in this State. The questions asked touching these matters were very numerous, and cannot all be set out here. In each case, however, the offered testimony was properly excluded because it was not shown that the circumstances and conditions were substantially the same as to the road inquired about as in the case at bar. One or two questions will serve to illustrate: 'Will you state to the court the rates that were being charged at that time in the different States of the Northwest on the different roads?' 'State what was the charge of the different roads in Iowa for the transportation of lime in 1888.' It requires no argument to show that the charges for carrying a like commodity on another road in Iowa or elsewhere would have no tendency to show the reasonableness of defendant's charges for a shipment of lime from Maquoketa to Sioux City, Iowa, unless the circumstances which must be taken into consideration in fixing the rate inquired about are substantially the same as those applying to the road in controversy. The proper foundation for the introduction of such evidence, even if admissible, was not laid." [5]

§ 519. Comparison of rates between different localities unjustifiable.

The rule and its limitation were well stated by the Interstate Commerce Commission when in a certain case [6] it was confronted by its finding in a previous proceeding.[7] The Commission said: "In support of the allegation that the charges complained of were 'unjust, unreasonable, and extortionate,' complainant's counsel in their brief direct attention to the order of the Commission in the Food Products case, investigated in

[5] Compare Interstate Com. Com. v. Louisville & N. Ry., 73 Fed. 409 (1896).

[6] Morrell v. Union Pac. Ry. et al., 6 I. C. C. Rep. 121 (1891).

[7] Food Product Case, 3 Int. Com. Rep. 93, 4 I. C. C. Rep. 48 (1890).

1890 by this Commission and to the rate of charges in force over the Northern Pacific lines from Pendleton, Oregon, to Seattle, Washington. The Food Products case involved charges on freight carried from Kansas and Nebraska points to Chicago. The conditions upon which these charges are based are so unlike the conditions affecting transportation in Oregon and Washington that the reasonableness of the grain rate from Kansas or Nebraska to Chicago affords no safe criterion for charges between Pullman, Washington, and Portland, Oregon. Transportation rates in force on lines of rival companies or on different branches or lines of the same company have a bearing upon and are entitled to consideration in connection with the question of reasonable charges for transportation services rendered under like conditions.

§ 520. Discussion of Cotting v. Kansas City Stock Yards Company.

There is a certain opposition to the views put forward in this chapter shown in the dicta in the opinion of Justice Brewer when he delivered the judgment of the court in Cotting v. Kansas City Stock Yards Company.[8] This was a bill in equity to enjoin the enforcement of a statutory rate for the use of the defendant's stock-yards. The court said:

"The State's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day, and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because by reason of the multitude the aggregate of his profits is large. The question is not how much he makes out of his volume

[8] 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, B. & W. 316 (1901).

of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large. Such was the rule of the common law, even in respect to those engaged in a quasi-public service, independent of legislative action. In any action to recover for an excessive charge, prior to all legislative action, who ever knew of an inquiry as to the amount of the total profits of the party making the charge? Was not the inquiry always limited to the particular charge, and whether that charge was an unreasonable exaction for the services rendered?"

It is necessary to point out the dangers in the language used in this case. The idea is put forward that what a public service company is entitled to is a reasonable profit upon each transaction if it can get that by charging no more than the service is worth to the patron. Suppose it were granted that a railroad company could make seven per cent. profit upon each shipment handled by it over and above every cost apportionable to that shipment, it would have indefensible results. A great railroad system might make dividends of many hundreds of per cent. while a small road was losing money in its operations. What each railroad is properly entitled to is gross receipts from all traffic sufficient to pay a fair return upon its reasonable capitalization, provided it may do so without charging outrageous rates; to this extent the large system and the small system are alike before the law. Whatever economies there may be in large scale operation belong to the public which authorized the business upon that scale subject to the established law that those who conduct it should have no more than a fair return upon their investment.

§ 521. Discussion of Canada Southern Railway v. International Bridge Company.

The same rule appears to have been the basis of decision of the Judicial Committee of the Privy Council in the case of Canada Southern Railway v. International Bridge Company.[9] This was a suit in which the railroad claimed that the bridge company was charging it too high a toll for the transportation of passengers across the bridge, the toll charged being ten cents for each passenger. Lord Selborne said: "It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their Lordships asked counsel at the bar to point out which of these charges were reasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested."

In this case the court pointed out a necessary limitation of the rule; if the income of the company from the rates is so great as to give an unreasonably great profit to the company upon all its operations, it will be inferred that the rates, though *prima facie* reasonable, must be too high. Thus in the Niagara Gorge

[9] 8 App. Cas. 723, B. & W. 315 (1883).

case, while fifteen per cent. was not an unduly high rate of profit for so hazardous an investment, one hundred per cent. would doubtless have proved that the individual rate was too high, even though it was reduced neither by competition nor by the limit of desire of the traveller. So in the Kansas City Stockyards case. While eighteen and one-half cents seemed in itself reasonably cheap for the care and feeding of an animal, and was so where the net profit was less than five per cent., the finding might have been different if the seemingly reasonable individual rates had in the aggregate brought in a net profit of fifty per cent.

§ 522. Principles of usual rates peculiarly applicable to passenger fares.

The principle of permitting the railroads under ordinary circumstances to charge usual rates of fare is particularly useful in dealing with the validity of passenger fares. There are certain standards of what will constitute a not unreasonable charge per mile for a passenger in most communities which it can hardly be shown to be unreasonable to maintain. Thus in one proceeding [10] the Interstate Commerce Commission said: "We cannot find upon this record that $1.10 is an unreasonable charge from Niagara-on-the-Lake to Buffalo. This is a branch line of the defendant and the case does not show density of traffic, nor the circumstances under which the passenger service is performed. It simply appears that a rate of 3 cents per mile is imposed. While lower rates are in force in many parts of the United States, it is also true that there is hardly any section of the country in which a rate as high as 3 cents per mile is not charged for a local service of this distance. The fact that a rate of 85 cents is made during the summer season to meet competition via Lewiston is not controlling, nor is the further fact that the New York Central under compulsion of law establishes a rate of 2 cents per mile from Lewiston to Buffalo. We do not

[10] Cist v. Michigan Central Ry., 10 I. C. C. Rep. 217 (1904).

find that this rate is reasonable; we simply fail to find that it is unreasonable, as there is no evidence in the record upon which an intelligent judgment can be formed. This is a most unsatisfactory disposition of the question, and if the case were of wider application, or the subject of more general complaint, it would be our duty to proceed on our own motion to develop the necessary facts."

TOPIC D—RATES BASED UPON VALUE OF SERVICE TO THE SHIPPER.

§ 523. What the traffic will bear.

It is sometimes suggested that the value of the service to the customer is "what the traffic will bear," [1] that is, what he will be willing to pay rather than lack the carrier's service. In one sense, the service is worth what one will pay for it. This is the rule which always appeals to the company as fair and just. And indeed this consideration has some place in every philosophy of rate making; although it is submitted that it is a dangerous principle which may often operate to the disadvantage of the public unless it is much modified in many cases. So necessary is some such principle felt to be by traffic managers that it will always be found to be continually employed in rate making; and this is one of the prime causes for the necessity of governmental revision, for the protection of the public, of the rates established by the carriers. The real truth of this matter seems to be that the policy of charging what will produce the largest volume of business is fundamental in private businesses, but often opposed to the law governing public businesses. "Another reason assigned by the carriers for these advances in grain rates was difference in traffic conditions. It was said that competition was less active, and that rates could therefore be maintained. We think that herein is found a substantial reason why these

[1] Charging what the traffic will bear has been discussed to some extent elsewhere. See §§ 481-482, *supra*.

rates could be advanced and maintained; whether it be also a reason why they should be is another matter." [2]

§ 524. Legal limitations upon this principle necessary.

It is urged sometimes that this principle of charging what the traffic will bear contains its own safeguards; for if more is charged than the value of the service to the shipper shipments will cease, and traffic managers, realizing this, as they are in close touch with the situation, will never intentionally or permanently charge more than the transportation is worth to the goods carried. The answer to this seems to be that many shippers will pay for the transportation of most goods more than the true value of the transportation if that is necessary in order to get their goods to market. They will shift this undue burden upon the consumer if they can, and if not they will be obliged to forego a part, or in extreme cases all, of their legitimate profit in order to get their products sold at all. The quotation in the next sentences brings this out. "It is clear, therefore, that the mere fact of the need of additional revenue to meet increased expense does not justify the advance in the rate on lumber. It is said by the witness above referred to that lumber was selected because it was thought lumber would '*bear the advance.*' This excuse for selecting lumber is based upon the erroneous idea, hereinbefore alluded to, that any rate is justifiable under which 'the traffice will move.'" [3]

§ 525. Limit of value of service not necessarily limit of charge.

It is clear, at any rate, that the charge is not necessarily limited to the advantage which the customer derives from the service. Thus where farmers in the west were shipping their grain for sale to the eastern markets, and they complained of the

[2] Re Proposed Advances in Freight Rates, 9 I. C. Rep. 382, 391 (1903).
[3] Tift v. Southern Ry., 10 I. C. C. Rep. 548, 586 (1904).

freight rates because after paying the rates they could not always realize the cost of production, the Interstate Commerce Commission held that the freight rates could not be so limited that the shipper should always be able to realize a profit, while they also held that the charges should have a reasonable relation to the cost of production and the advantage obtained by the producer from the shipment.[4] This was an inquiry instituted in accordance with a vote of the Senate into the reasonableness of railroad charges on food products. Mr. Commissioner Morrison said: "The preamble and resolution of the Senate and the resolution which led to their adoption imply that to be reasonable the rates on food products must be such as to enable the products to be marketed at actual cost of production. This basis or limit of compensation for transportation services will hardly stand the test of fair dealing. It would compel those who invest in or operate railroads to assume and bear the losses resulting from the improvidence, mismanagement or unprofitable employment of others. There are many considerations other than the cost of such transportation service which enter into the prices of all commodities, and while railroad charges may influence such prices they do not make or control them. To the extent that excessive rates contribute to unremunerative prices the roads may justly be held responsible for them and to that extent only. There is an excellent clay in Nebraska for making bricks, a useful and creditable industry. Bricks are much needed in New York. The people of Nebraska have a right to make them as well as a right to have them shipped to New York at reasonable rates. But it might be that when such reasonable rates were deducted from the price received the remainder would be less that the "actual cost of production." That would not necessarily make the rates unreasonable. Unfortunate it may be, but still of necessity the claims of the shipper must wait upon the rights

[4] In re Rates and Charges on Food Products, 3 Int. Com. Rep. 93, 4 I. C. C. Rep. 48 (1890).

of those whose services he employs and whose property he uses. The employees who run the train may have neither brick, corn nor railroad investment, but they must be paid for their services. The road must be repaired and bridges mended. Actual and honest investment must receive fair reward. All this must be paid before the profits or actual cost of producers are paid unless the services and property of others are to be appropriated to the use of those who for the time may be engaged in an unprofitable business or disadvantageously located industry. We think it is true that at the prices which have at times prevailed since the gathering of the last crop corn from the most distant fields could not be marketed at actual cost of production and pay reasonable rates. But the evil cannot be remedied without taking the services or property of men engaged in one business or employment and transferring them to those engaged in other employments. To make such transfer is a prerogative not to be exercised by any tribunal."

§ 526. Traffic will continue to move at unfair rates.

From a legal point of view it is a conclusive answer to the economic argument, that people will continue to ship goods even at unfair rates: "The volume of movement is not limited by an advance in the charge for carriage. During the year 1901 about fifty millions of tons of anthracite coal were produced and consumed in the United States. If the price of that coal had been 25 cents per ton higher to the consumer than it actually was, this would not probably have very much reduced the amount of consumption, although an addition of that much per ton to the freight rate would have increased the net revenues of carriers over twelve million dollars; representing on a four per cent. basis, if made permanent, three hundred million dollars of capital. These very grain rates before us furnish an excellent illustration. The advance of 2 1-2 cents per hundred pounds from Chicago to New

York amounts to 5 cents a barrel on flour. Rates west of Chicago have also been advanced, and the total added cost from the grain field to the consumer upon the Atlantic seaboard would be from 10 to 15 cents per barrel. Assuming that the entire additional expense were charged against the consumer, it is hardly conceivable that this increase in price would produce a material effect upon the quantity of flour transported and consumed.

"When, therefore, these traffic managers met in New York and determined to advance these rates, they simply laid upon the people of this country a tax of 2 1-2 cents per hundred pounds. If they were entitled to it, that action was justified; otherwise it was unjustified. The fact that the traffic still moves, that people still eat flour and corn-meal, does not by any means conclusively show that the rate is reasonable. As we have already said, the reasonableness of every rate may be presented in two aspects: First, is it reasonable as tested by cost of service, by comparison with other rates, with respect often to commercial conditions? Second, is it reasonable as a tax imposed by a public servant for the performance of a quasi-public duty?" [5]

§ 527. Worth of the service to the individuals served taken as a whole.

Some excellent distinctions are taken in a recent case [6] as to the methods of arriving at the value of the service to the person served by a public service company; and it is pointed out that what is sought is the worth to the individuals served taken as a whole of such service as they are receiving from a company such as that which is serving them. This shows the true test

[5] Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382, 434 (1904).

[6] Brunswick & T. W. Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

of the value of the service to the person served to be far from what the person in question will pay rather than go without service. As this is a matter not often discussed with discrimination a considerable quotation is extracted. Mr. Justice Savage said: "When the worth of the water to a consumer is estimated, we are not limited to the value of water itself, for it is an absolute necessity. Its value has no limit. Water, speaking abstractly, is priceless; it is inestimable. To sustain life it must be had at any price. And in this respect a public water service differs from all other kinds of public service. In estimating what it is reasonable to charge for a water service—that is, not exceeding its worth to the consumers—water is to be regarded as a product, and the cost at which it can be produced or distributed is an important element of its worth. It is not the only element, however. The individuals of a community may with reason prefer to pay rates which yield a return to the money of other people higher than the event shows they could serve themselves for, rather than make the venture themselves, and risk their own money to lose in an uncertain enterprise. It was said by us in the Waterville case that the investor is entitled to something for the risk he takes, and it is not unreasonable for the customer to be charged with something on that account. That is one of the things which make up the worth of the water to the customer. The same element enters always into the relations between producer and consumer. But such a consideration as this last one must always be treated with caution. The company is only entitled to fair returns, in any event, and "fair" to the customer as well as to itself. In the aspect now being considered, the worth of a water service to its customers does not mean what it would cost some one individual or some few individuals to supply themselves, for one may be blessed with a spring, and another may have a good well. It means the worth to the individuals in a community taken as a whole. It is the worth to the customers as individu-

als, but as individuals making up a community of water takers." [7]

§ 528. Cost of obtaining a substitute for the service furnished.

In at least one case the suggestion was made that the cost to the consumer of obtaining the service for himself was the true criterion. In Grand Haven v. Grand Haven Waterworks,[8] the court was obliged to determine the proper amount to be allowed by the city for water furnished by the defendant company. The court held that in the absence of definite evidence of the value of the services, the company should be allowed what the city had been saved by the water furnished, which was found to be eight per cent. upon the amount necessary to build a plant which would furnish the water. The Court said: "Down to the fall of 1897, when the city commenced to extend its own waterworks, the city had an inadequate plant for fire protection—worth, as testified by the witnesses, about $6,000. The deficiency of the city's plant was supplied by the defendant, substantially. It appears by the testimony of an expert called by the complainant that the cost of a plant which would furnish adequate fire protection would be about $20,000. It would appear, therefore, that the city was saved the interest and depreciation on $14,000, which, at the rate of 8 per cent., would amount to $1,120 per year." The course of the court in this case is certainly open to criticism. The rule adopted gives to the company all the profit on the transaction, leaving the consumer no better off than if he had supplied the water for himself. Yet there was presumably a considerable profit in the transaction; at least, such would ordinarily be the case. A fair share of this profit ought to be extended to the consumer.

[7] See, also, San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903); Kennebec Water District v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902).

[8] 119 Mich. 652, 78 N. W. 890 (1899).

In the ordinary case, such a rule would be prohibitive. A farmer, a thousand miles from market, could not afford to pay as freight on his grain what it would cost him to build a railroad or to cart his crops to market; nor could a person who desires to cross a river pay a bridge company by way of toll what it would cost him to get across on his own account. Such a basis of compensation is certainly unreasonable to the customer.[9]

§ 529. Charging what the traffic will bear hardly applicable to passenger fares.

Charging what the traffic will bear has obviously very little scope in justifying differences in passenger fares. Plainly rich men cannot be charged more than poor, nor men with important engagements more than people who have no business interests; but then these would be forbidden as personal discriminations. However, the principle has some operation in making up a schedule of passenger fares for a railroad system. Thus suburban fares for a considerable zone around a large city are placed at considerably lower rates per mile than for long distance runs. The real reason is that a heavy passenger traffic to suburban points could not be developed at the average mileage rate for the system. So long as this is a remunerative business it would seem that it is better for the whole traffic that these concessions should be made. In one case before the Interstate Commerce Commission[10] it was said: "The granting of commutation rates for suburban travel is quite general and such rates are defensible on various grounds. They tend to benefit the public by permitting and inducing residence at considerable distance from the place of occupation, thus aiding the territorial growth of cities and relieving their congested districts. So far as they have that effect such rates in turn benefit the railways by securing business that otherwise would

[9] See Canada Southern Ry. v. International Bridge Co., L. R. 8 App. Cas. 723, B. & W. 315 (1883).

[10] Sprigg v. Baltimore & O. Ry., 8 I. C. C. Rep. 443 (1900).

not exist and revenue not otherwise obtainable. Ordinarily, the price of commutation tickets, the conditions upon which they are sold, and the distance from a given city to which commutation rates shall be extended, are matters within the discretion of the carrier."

TOPIC E—RATES DICTATED BY COMPETITION.

§ 530. Rates may be made to meet competition.

Within the many limitations which are discussed throughout this book a railroad company may make such rates as it is necessary for it to make to meet competition. A great deal of transportation is conducted under competitive conditions, the shipper having an alternative route by which he may get his goods to market. Under such circumstances railway rates between the competitive points will inevitably tend to be lower than between points where there is no competition. To a certain extent the public is rejoiced to see lower rates from whatever cause, and it will in an ordinary case be unquestioned that the carrier may make his competitive rates as low as is necessary to get the business. But this statement is subject to certain limitations, some of which will now be discussed, but most of which are discussed more fully in later chapters.[1]

§ 531. Policy for permitting competitive rates.

The policy of this matter seems to be to permit the making of rates to meet competition even if proportionately they seem preferenial, in order that competition may be possible, which it could not be without this permission. This is very acutely said by Lord Herschell in Phipps v. London & North Western Railway Company:[2] "Suppose that to insist on absolutely equal rates would practically exclude one of the two railways from the traffic, it is obvious that those members of the public who are in the neighborhood where they can have the benefit of this competition would be prejudiced by any such proceedings.

1 See Chapter XIX and Chapter XXV, *infra*.
2 (1892) 2 Q. B. 229.

And further, inasmuch as competition undoubtedly tends to diminution of charge, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this Act of Parliament not being so used as to destroy a traffic which can never be secured, but by some such reduction of charge, and the destruction of which would be prejudicial to the public by tending to increase prices."

§ 532. Competitive rates may be made low enough to hold business.

Without going into the many problems as to local discrimination, the result largely of statutory provisions and their construction, which are discussed later, it may be pointed out briefly that it is a general principle recognized in all of those cases that it is permissible to make the competitive rate low enough to get business and to hold it. In order that the language of the judges may be seen, one case is selected from this long list for quotation. In that case[3] the reasonableness of relative rates to Montgomery, Ala., and Troy, Ala., was in question. The court pointed out that competition operated in fixing the Montgomery rate: "There are many more railway lines running to and through Montgomery, connecting with all the distant markets. The Alabama River, open all the year, is capable if need be of bearing to Mobile, on the sea, the burden of all the goods of every class that pass to or from Montgomery. When the rates to Montgomery were higher a few years ago than now, actual active water line competition by the river came in, and the rates were reduced to the level of the lowest practical paying water rates; and the volume of carriage by the river is now comparatively small, but the controlling power of that water line remains in full force, and must ever remain in force, as long as the river remains navigable to its present capacity. And this water line

[3] Interstate Com. Com. v. Ala. Midland Ry., 69 Fed. 227, 74 Fed. 715, 41 U. S. App. 453. See Chapters XXV and XXXVIII, *infra*.

affects, to a degree less or more, all the shipments to or from Montgomery from or to all the long distance markets. It would not take cotton from Montgomery to the South Atlantic ports for export, but it would take the cotton to its points of ultimate destination, if the railroad rates to foreign marts through the Atlantic ports were not kept down to or below the level of profitable carriage by water from Montgomery through the port of Mobile. The volume of trade to be competed for, the number of carriers actually competing for it, a constantly open river present to take a large part of it whenever the railroad rates rise up to the mark of profitable water carriage, seem to us, as they did to the Circuit Court, to constitute circumstances and conditions at Montgomery substantially dissimilar from those at Troy."

§ 533. Rates must not be reduced by competition, below a remunerative basis.

This principle permitting the carrier to make in particular instances low rates to meet competition has its limitations; it will not justify the making of rates which will not be remunerative, as that must result in throwing undue burdens upon others. "The principle of relative justice applied is that when a carrier, by reason of competitive conditions, or for other reasons, serves certain localities at very low rates, the concessions made must not subject other localities or other patrons dependent on the same carrier to undue or unreasonable prejudice or disadvantage, but there must be an equitable adjustment of rates so that there is no unjust discrimination between competitors in like pursuits.

"There may be cases in which a carrier legitimately engaged in serving some territory is compelled by some new and aggressive competition to reduce normal and reasonable rates to retain business for its line, and where corresponding reductions at points not affected, or less affected, by destructive competition,

might be unreasonable. But when a carrier voluntarily enters a field of competition where, by reason of a disadvantageous route, or the rigor of the competitive conditions, remunerative rates cannot be charged, and its service to a portion of its patrons is unprofitable, it accepts the legal obligation that its service shall be impartial to all who sustain similar relations to the traffic, and from whom the service itself is not substantially dissimilar. As was said in Re Chicago, St. P. & K. C. R. Co.,[4] 'If they (carriers) deliberately proceed to destroy each other, the law must take care that in doing so they injure as little as possible individuals and communities dependent upon them for transportation facilities.' This is the plain requirement of the Statute, and it is in accordance with obvious principles of justice." [5]

§ 534. Standard rate among competing lines.

Where a competitive situation has become established by presence of various competing lines performing the same service to the community, it tends to become settled between the competitors what shall be the standard rates and what differentials shall be allowed from these rates. The standard rate might be that established by the shortest and otherwise best located road, but it would not be fair in reducing rates all over the territory involved to reduce all rates to the lowest margin of profit fair to that particular road, for other roads could not meet that rate without ruin, it may be. On the other hand it would be bad public policy to permit as an artificial standard what the most circuitous and worst located road might need to make a good profit. As in most problems of rate making the result must be some compromise. This was pointed out by the Interstate Com-

[4] 2 Int. Com. Rep. 137, 2 I. C. C. Rep. 231.

[5] Schoonmaker, Com. in Manufacturers & Jobbers' Union v. Minneapolis & S. L. R. R., 3 Int. Com. Rep. 115, 1 I. C. C. Rep. 227 (1890).

merce Commission in one of its investigations,[6] the Commission saying:

"It might be manifestly unfair to select a single advantageous line and make that the standard. We have seen that grain can be transported under actual conditions by the Lake Shore and the New York Central Railroads from Chicago to New York at a cost less than that by most other routes. It would be hardly just to these other routes to compel the putting in of a rate upon that line which was reasonable with respect to it alone and which had no reference to its competitors. Upon the other hand, it would be equally unfair to the public if the most expensive line were made the standard. The Southern Railway carries grain to some extent to Norfolk, Virginia. The distance is fully as great; and the rate less than to New York. Its operation is expensive; its tonnage comparatively light; its net earnings per mile only about $1,700. A rate to the seaboard which upon any fair basis of compensation to investment would be reasonable for that company would be extravagantly high for the trunk lines. To permit such a rate would be to impose upon the general public the payment of an exorbitant charge."

§ 535. **Competition not a ground for raising rates.**

There are occasional cases where a road has urged the presence of competition as a ground for raising rates. To put one case[7] in the language of the Interstate Commerce Commission which passed upon it: "Previous to the summer of 1887, grain and other freights destined to Portland from points further east, including Pullman, passed over the lines of the Oregon Railway & Navigation Company. In 1887 and 1888 the Northern Pacific Railroad Company extended its lines west to Tacoma, thence to Portland, and east to Pullman and other points in the grain growing region in southeastern Washington, and over its lines so

[6] Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382, 425 (1902).

[7] Morrell v. Union Pacific Ry., 8 Int. Com. Rep. 181, 6 I. C. C. Rep. 121 (1893).

extended the Northern Pacific Company took from Pullman and other points a considerable part of the wheat and other freights which would otherwise have been carried over the road of the Oregon Railway & Navigation Company. The defendants urge this diversion of Pullman and other traffic from their lines in jusification of higher transportation charges than would be reasonable if there was no competition for Pullman business. Competition, or a division of business as the result of building a second road where previously but one existed, should justify lower rather than higher charges."

The conclusion of the Commission is undoubtedly the proper way of dealing with such a case, but the reason is not quite obvious. It is plain that there is always some waste in all competition which makes a certain additional cost to be borne by the traffic because of the additional fixed charges by reason of unnecessary duplication of plant. But more than this, perhaps, is the increased cost of transportation by reason of decrease in the volume of traffic, consequent upon the division of the business among the competing lines. And yet the principle of value of the service to the shipper seems to come into play here; for the service is worth no more to the shipper whether there be one line or three.

§ 536. Absence of competition does not justify increase in rates.

To the extent that competition becomes more remote the power to raise rates to any amount that the traffic will bear increases until a point is reached where there is no virtual competition and then that power becomes absolute; but as has been seen already in this chapter, the public needs the protection of the law of the land in this situation, for the economic limitation leaves scope for gross oppression. It is therefore plain law that the absence of competition does not justify an increase in rates. The elimination of railroad competition by the aggrega-

tion of large systems has been the characteristic fact in railroad history during the last twenty-five years; and indeed within the last ten years there has been a further extra-legal consolidation of many of these systems by communities of interest, until today there are a comparatively few groups.

"Such unification of railway control permits advances in rates and a maintenance of rates which has never before been possible. If carriers are entitled to larger returns, these increases are proper, and should be permitted; otherwise they should be checked. It cannot be accepted without careful consideration that all this vast increase in traffic, all these notable economies in railway operation are to result in the permanent imposition of higher transportation charges." [8]

§ 537. Competition justifies differences in passenger fares only to a certain extent.

Competition dictates particular rates in passenger schedules to a certain extent, but the differences between stations by this process are not made glaring. It is true that between competitive points fares are kept down, but this tends to shrink the whole schedule relating to intermediate stations. Even the most extreme cases are usually those where the long haul between competitive points is charged relatively less than the short haul, or in some cases where the short haul is made as high as the long haul; but if a railroad attempted to charge more for a short haul than for a long haul it would hardly be possible to make the public accept a difference of this sort. The general operation of competition upon passenger fares is to keep all down to a lower level. The matter of joint through rates, discussed at another place, gives more scope to the doctrine that particular rates may be lowered to meet competition. Thus the part of a through passenger rate apportioned to one of several railroads as its share may often be less than the rate which that railroad

[8] Re Proposed Advances of Freight Rates, 9 I. C. C. Rep. 382, 437 (1902).

makes between its own termini to its own passengers; as these joint through rates may be reduced to meet competition this difference is justified.

TOPIC F—RATES DESIGNED TO EQUALIZE ADVANTAGES.

§ 538. Limited operation of the principle of equalization at law.

This topic as to the limitations placed by the law upon making rates designed to equalize advantages is again one that will receive attention later when the construction to be placed upon statutory provisions forbidding local discrimintions is brought up. But it seems appropriate to point out in this place that it is a principle in rate-making subject to all of the limitations which have been brought out in this chapter, and that it has therefore a very limited operation. However much this theory may have appealed to some economists who have applied their theories of what is for the best interests of society to the railroad problem, it has very little weight with the lawyers who have had to do with the question.[1]

"It is not the duty of a carrier to regulate markets. If by reason of competition in transportation or the condition of markets a carrier sees fit to move traffic at very low rates in order to participate in the business, that may be done and often is done, but that is a very different matter from compelling it to reduce all its rates to equalize competition between shippers from different fields of supply and by different and unrelated routes."[2]

[1] See §§ 486, 487, *supra*.

[2] Schoonmaker, Com. in Rice v. Western N. Y. & Pa. R. R., 2 Int. Com. Rep. 298 (1888).

§ 539. Relative rates need not be adjusted from a commercial standpoint.

It is sometimes maintained by a shipper of one product which is competitive with another product that the rates should be adjusted so as to equalize the standing of the competitors. This has been argued before the Interstate Commerce Commission with great insistence several times, but never with real success. Thus in one case [3] the contention was made that the rates upon live stock and dressed beef should be so adjusted that a packer in one part of the country might compete upon equal terms with a packer in another part. The commission in its opinion pointed out that this was not a basis upon which the carrier could be compelled to make rates, if indeed the railroad ought ever to act upon such a principle to any extent.

"It is evident, therefore that relative rates cannot be adjusted from a purely commercial standpoint. In saying this it is not to be understood that the increased value of the product is not legitimately to be taken into account in fixing the rate, which is altogether a different proposition from that advanced by the complainants that the rates should be such as to equalize the standing of different producers in the business in the respective markets of the country.

"We are of opinion that in the fixing of relative rates upon articles strictly competitive, as these are, the proper relation should be determined from the cost of the service, and if the difference in this respect between two competitive articles can be ascertained, such rate should be fixed for each as corresponds to the cost of service. This is fair to the carrier, and we believe the manufacturer has a right to demand of the companies that such a relation of rates as to these articles should be maintained."

[3] Squire v. Michigan Central Ry., 3 Int. Com. Rep. 315, 4 I. C. C. Rep. 611 (1891).

§ 540. **Business situation should not be ignored altogether.**

The same question was again raised and elaborately considered by the Interstate Commerce Commission in the case of Chicago Live Stock Exchange v. Chicago Great Western Railway.[4] The railroads had again made the same rate on live stock and its products. It was shown that in some respects the cost of carrying one was lower—in other respects, the cost of carrying the other. Mr. Commissioner Fifer said:

"Another very important factor is the relation existing between the articles transported. If the relation is remote, such as that between flour and silk, a change of a few cents per hundred pounds in the rates charged for transporting one of them may not affect traffic in the other; but if the relation is close, such as that between raw material on the one hand and goods manufactured from that material on the other, a slight change in the adjustment of transportation charges between the two articles may be sufficient to close manufacturing plants at some points and increase the output of plants located elsewhere. And it is because of this difference that some discriminations made by carriers are justifiable under certain circumstances.

"The competition between live stock and the products of live stock is very severe both in the markets of purchase and in the markets of sale, and live stock raised in the vicinity of the Missouri River is now and for many years has been transported to and slaughtered at different points in territory lying between that river and the Atlantic Seaboard. Packing houses at these different points have been established and maintained under rates of transportation which, generally speaking, have not been higher, while in many instances they have been lower, on the live stock than on the products; and the principle governing this adjustment, namely, that the rates on raw material shall not be greater than on the products of the material, has been applied in nearly all cases of a similar nature."

[4] 10 I. C. C. Rep. 428 (1905).

§ 541. **Rates should not equalize differences in value.**

The railroad cannot by its rates equalize qualities of the same article between different producers. In McGrew v. Missouri Pacific Railway,[5] the defendant contended that as coal from its mines at Rich Hill has less value for domestic purposes than Myrick coal it might equalize such difference in value by making a lower rate on Rich Hill coal. The complainant's cost of mining coal at Myrick is nearly 50 cents a ton more than it costs defendant to mine its coal at Rich Hill. The Commission, however, held that this difference in quality would not justify a difference in rate. Mr. Commissioner Prouty said: "If difference in quality is to be equalized in favor of the defendant, why should not difference in cost of mining be equalized in favor of the complainant? When this complainant acquired his mine he knew that the value of this coal was greater for domestic purposes than that of Rich Hill, and the price of his mine may well have been fixed in view of that fact, but such an adjustment of rates as that put in force by the defendant entirely eliminates this element of value and might destroy the worth of complainant's property. If any such process of equalization is permissible defendant may absolutely dictate the comparative value of every mine and industry upon its road; and that such rates should be examined with closest scrutiny when resorted to by the carrier in its own favor."

§ 542. **Passenger fares slightly affected by this principle.**

Passenger schedules are usually made upon a mileage basis; there is little attempt in making them up to minimize the disadvantages of distances. But the principle is applied to a very limited extent by the railroads; for example, suburban stations are sometimes grouped in zones. The principal illustration of this policy, if it be such, of equalizing passenger fares is the five cent fare customary in American municipalities for transporta-

[5] 8 Int. Com. Rep. 630 (1900).

tion in street cars whether the passenger rides for one block or ten miles. By this policy most land within a metropolitan district is brought within the benefit of this uniform fare, whatever may be its distance from the commercial centres. In justifying a consolidation of street railways one judge said:[6] "As a result, at the time the ordinance was adopted, the mileage of tracks increased from the previous aggregate of 110 miles to 142 miles, reaching every section of the city, with shorter and better routes, and furnishing 38 transfer points, with a universal transfer system,—a feature of especial value to the public, as a single fare of five cents gives a maximum length of ride more than double the old arrangement."

[6] Milwaukee Electric Ry. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898).

CHAPTER XVIII.

CLASSIFICATION OF COMMODITIES.

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TOPIC A—METHODS OF CLASSIFICATION.

§ 551. The meaning of classification.

Carriers have from time immemorial divided the articles carried by them into classes. The articles are classified in such a way as to bring together into one class such articles as can fairly be subjected to the same charge for carriage. A rate is then fixed for each class; not a difficult matter, since it has been found quite practicable to make the number of classes small. This division of all possible articles of transportation into a few large classes as a basis for fixing the rates of carriage is what is known as classification of freights. It has been said [1] that classification was first adopted on the English toll-roads and canals; and an interesting early schedule of canal tolls shows a rough classification. But it is probable that the necessity of the case forced a more or less crude classification upon carriers as soon as carriage became a business. For, as will be explained, fairness to the shipper and the convenience of the carrier both require a classification of commodities as the basis of rate-fixing

§ 552. The necessity of classification for a proper distribution of the burden.

Different articles require such different care in carriage that it would be unjust to fix a single rate that should apply to all

[1] Noyes American Railroad Rates, 5, 65.

articles carried. If a uniform rate were fixed for each pound carried, lead would be more expensive to ship than live stock; and if the rate were proportioned to bulk, a diamond would be carried more cheaply than fence-posts. It is necessary in order to distribute fairly among the shippers the burden of the entire schedule of rates to graduate the charge according to the nature of the article carried. "Classification is recognized as a necessary method of adjusting the burdens of transportation equitably upon the various articles of traffic, in view of differing circumstances and conditions, and *but* for the necessity of such adjustment, considerations based alone on weight and distance of haul would probably determine rates, except as modified by competition. This method, while securing practical uniformity, would probably deprive many articles which are now important factors in commerce of the benefit of transportation to distant points." [2]

§ 553. The necessity of classification for convenience in rate fixing.

So many varieties of articles are carried by a modern carrier that it is a practical impossibility to consider each article by itself and fix a separate rate for its carriage. It is impossible even to enumerate all the articles that may be offered for transportation; still more so to frame a schedule showing an independent rate for every such article, and convey information of the schedule to every freight agent in such a form that he can quickly and accurately state a rate to the shipper. No modern carrier doing a large business, and especially no modern railroad, has undertaken to make rates without classification. The attempt to frame separate rates "has proved to be so cumbersome and inconvenient that the arrangement of freight into classes is deemed by the roads an essential part of rate-making, and is so treated by the Act to regulate commerce, which re-

[2] McDill, Com. in F. Schumacher Milling Co. v. Chicago, R. I. & P. R. Ry., 6 I. C. C. Rep. 61, 66 (1893).

quires that the schedule of charges which every carrier must keep open to the public 'shall contain the classification in force.'" [3]

§ 554. The history of classification in the United States.

Before the passage of the Interstate Commerce Act each railroad company had its own classification of commodities, and fixed its own rates; subject to occasional modification by pools and traffic agreements with connecting or competing roads. Upon the passage of the Act the inconvenience of this system became so obvious that partially successful efforts were made to bring about a uniform classification. The railroads operating in the northeastern part of the United States agreed upon a classification known as the Official Classification; those operating in the southeastern part of the United States agreed on a separate classification known as the Southern; and those in the west agreed on the Western Classification. The boundaries between the territory covered by these classifications respectively are formed by the Potomac, the Ohio, and the Mississippi Rivers.[4] These classifications now prevail throughout the country.[5]

§ 555. Uniformity of classification attempted.

Various attempts have been made to secure one uniform classification throughout the country; and to this effort the Interstate Commerce Commission has lent its aid. "The Commission has sought as far as practicable to secure the establishment

[3] Coxe v. Lehigh Valley R. R., 3 Int. Com. Rep. 460, 4 I. C. C. Rep. 559 (1891).

[4] This general statement requires some modification in detail. Thus goods shipped west from Chicago take the Western classification at once. On the Pacific slope the Western classification is modified. And every railroad, as will be seen, may make "commodity" rates for certain articles outside the classification, and thus each road may to a certain extent make an independent rate.

[5] See Thurber v. New York C. & H. R. R. R., 2 Int. Com. Rep. 742, 3 I. C. C. Rep. 473 (1890).

throughout the country of a uniform classification of freight, believing it to be to the interest and advantage of both carriers and shippers." [6] But although at one time the effort seemed on the point of success, nothing came of it.

It is doubtful whether it will ever become possible to frame one uniform classification. The differences of classification are in fact due to fundamentally different conditions in the three great divisions of the country; differences in density of population, in nature and purpose of traffic, in cost of construction and maintenance, which necessarily influence to some extent the classification of articles carried. Until there is greater uniformity of conditions, identity of classification is unlikely, and if secured would probably operate unjustly.

"While the nearest approximation to uniformity of classification is desirable, all agree that great caution should govern attempts to bring it about. The Commission has said, 'to force it at once was undesirable,' and 'while one dealer might be greatly benefited another might be ruined,' and that 'the final adjustment of a uniform classification must necessarily be the arrangement of a number of compromises.' And it was said in Pyle v. East Tennessee, Virginia & Georgia Railroad Co.[7] that occasional inequalities of rate, and slight and occasional differences in the rates charged would not prove that the whole system is wrong and that 'when comparison is attempted to be made of classification and rates, different conditions of transportation cannot be ignored.'" [8]

§ 556. Classification necessarily imperfect.

It is obvious, of course, that the fewer the classes created the more imperfect the classification will necessarily be. Since the

[6] Yeomans, Com. in Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489, 505 (1905).

[7] 1 Int. Com. Rep. 770, 1 I. C. C. Rep. 473 (1888).

[8] McDill, Com. in F. Schumacher Milling Co. v. Chicago, R. I. & P. R. R., 6 I. C. C. Rep. 61, 67 (1893).

very nature of classification is the grouping together of different things, it is not possible to secure exact accuracy of treatment for all the varieties included in the class; and the fixing of rates in this method therefore involves compromise, and can at best only approximate correctness.[9] As the Interstate Commerce Commission has said, in the most exhaustive case on this subject (National Hay Association v. Lake Shore & Michigan Southern Railway):

"The making of railroad tariffs is simplified by classifying the great number of articles commonly offered for transportation and fixing rates for the different classes instead of making a separate rate for each commodity. In a classification such as the Official, which contains but six general classes, it is manifestly impossible to bring together in each class only such articles as resemble each other in the elements of character, use, value, volume, bulk, weight, risk and expense of handling, which have so often been referred to as governing conditions in freight classification. Besides these general considerations affecting classification, competition is often an important factor. Such competition includes not only that between carriers, but also that of a commodity produced in one section with the same commodity produced in another section, and sometimes the competition of one kind of traffic with another.

"Necessarily many articles must appear together in a class which bear little relation to each other in all these respects, though some may be of like character while differing in bulk or in value, others have similar bulk while varying largely as to weight or volume, and still others present similarity in one or more of the elements mentioned, but have no common relation as to others. The best that can be done under such a scheme of classification is to place two or more articles possessing general

[9] Proctor & Gamble Co. v. Cleveland, Cin. & Chicago & St. L. Ry., 3 Int. Com. Rep. 131, 4 I. C. C. Rep. 87, per Veazie, Com. (1890).

similarity in the same class, and where an article is not analogous to any other to put that article in the class containing commodities which are most nearly related to it in general character and other essential respects." [10]

§ 557. Classification not unduly minute.

No classification can be so minute as to conform to the differing varieties and conditions of traffic; and to separate different grades or densities of the same article into different classes with varying rates, even if it could be accomplished, would go far to defeat the real purpose of classification. If the rate on an article is reasonable to those who ship the great bulk of that article in the form in which it is commonly prepared for transportation, that rate does not become unreasonable to the shipper of a small quantity of the same article merely because the shipment is prepared in an uncommon form, and one which affords the carrier a greater profit per hundred pounds. This is particularly true when the preparation of that article in the more profitable form would impose some degree of hardship upon a large majority of shippers because of its greater expense or for other reasons; and accordingly in the case of the Planters' Compress Company v. Cleveland, Cincinnati, Chicago & St. Louis Railway [11] the Interstate Commerce Commission held that cotton compressed in a round bale, in which form it could be handled much more easily and occupied much less space than in the ordinary bale, was not necessarily for that reason entitled to a lower classification. And the Commission commended the rail-

[10] 9 I. C. C. Rep. 264, 306 (1902). This case was overruled by the Circuit Court of the United States, Interstate Com. Com. v. Lake Shore & M. S. Ry., 134 Fed. 942 (1905), on the ground that although the commission might declare classification unreasonable it might not direct what classification the commodity should take. This decision was upheld by an evenly divided court in the United States Supreme Court without opinions, 202 U. S. 613 (1906).

[11] 11 I. C. C. Rep. 382 (1905).

roads for placing in the same class all window shades, whether mounted or unmounted.[12]

It would seem that the classification should be no more minute than could be described in a reasonable general rule. This view was expressed by Mr. Commissioner Shoomacher in the case Andrews Soap Company v. Pittsburgh, Chicago & St. Louis Railroad:[13] "A matter so extensive and difficult as classification of freights must evidently be mainly governed by general rules. This is indispensable to any system of classification at all. The alternative is a rate for every commodity separately, instead of a class rate for articles of enough similarity in some controlling features to be classed together."

§ 558. Extra class divisions.

The standard classification, which contains five or six classes, while sufficient for ordinary commodities, does not and in the nature of things cannot cover exceptional cases, and especially cases of especially difficult carriage. In order to cover such exceptional cases, it is the custom to give certain commodities a rating above the first class, such as "double first class rates," or even higher.

Furthermore, there is a continual tendency to differentiate commodities, and to seek a means of giving to some article a rate which falls between two successive class rates. This tendency has resulted in the creation of intra-class ratings; such as a rate "forty per cent less than third class." This tendency is of course opposed in its fundamental principle to the whole theory of classification, and if given play enough would soon put an end to the system on which present rates are based; and it is therefore not to be commended as a general expedient. If it seems

[12] Veazie, Com. in Page v. Delaware, L. & W. R. R., 6 I. C. C. Rep. 148, 168 (1894). But see Interstate Com. Com. v. Delaware, L. & W. R. R., 64 Fed. 723 (1894).

[13] 3 Int. Com. Rep. 77, 4 I. C. C. Rep. 41 (1891).

necessary in any particular case, it is probably because the difference in rates of the two classes concerned is unduly great.

§ 559. Commodity rates.

But besides the extra-class rates proper, every road has specially low rates for some staple commodities, below the lowest class rates, which are known as commodity rates. The principle on which such rates are established is doubtless a sound one. The articles which are granted commodity rates are staples of comparatively low value, like grain, lumber, and salt, moving in great quantities over roads of which they form a large part of their traffic. A granger road, carrying great quantities of grain in bulk, is in an entirely different position as to traffic in grain from a road in another part of the country carrying small quantities from time to time to the small consumer; and while the traffic of the latter road can be classified, that of the former requires special treatment. Each road, therefore, may establish commodity rates in such cases; subject to the limitation that the rate must not be unduly low, so as to cause a loss. A commodity must not be carried at such unremunerative rates as will impose burdens upon other articles transported to recoup loss incurred in carrying that commodity.[14]

§ 560. Method of classification.

Classification in the United States, as matters are ordered to-day, is made by a committee appointed by the railroads operating within the terrritory for which the classification is to be prepared, who meet from time to time to prepare or revise the classification sheet. Classifications are adopted by this committee by majority vote, and are then published; and when published are binding on all the roads concerned. The printed

[14] Anthony Salt Co. v. Missouri Pac. Ry., 4 Int. Com. Rep. 1, 5 I. C. C. Rep. 299 (1892).

schedule containing the classification of all articles for carriage is called the classification sheet.

§ 561. Interpretation of the classification sheet.

The classification sheet becomes a document of interest to the public, and shippers are at once entitled to the benefit of its terms. It is therefore a document to which the carrier cannot give such an interpretation as it desires. The interpretation is subject to the rules governing writings in general, and the carrier is bound by the classification sheet according to its ordinary legal interpretation.

"The classification is supposed to inform the persons engaged in that business in what classes the articles they handle are placed for transportation purposes, and it would fail to do this if instead of employing terms of designation in the sense familiar to themselves it made use of them in a sense fixed upon by persons engaged in an occupation altogether different, and which might to an expert in their own business be strange and misleading." [15]

TOPIC B—GENERAL PRINCIPLES OF CLASSIFYING.

§ 562. Influences determining classification.

In Grain Shippers' Association v. Illinois Central Railroad [1] Mr. Commissioner Prouty thus described the process by which classification of freights has been accomplished: "In ideal traffic conditions certain elements would be taken into account in establishing a freight rate. These, among others, would be the value of the commodity, the bulk of the commodity, the cost of service, the volume of traffic, etc. Under these conditions the witnesses rather thought that value might be a pretty important

[15] Cooley, Chairman, in Hurlburt v. Lake Shore & M. S. R. R., 2 Int. Com. Rep. 81, 2 I. C. C. Rep. 122 (1888).

[1] 8 I. C. C. Rep. 158 (1899).

factor in determining the freight rate. Under actual conditions, while an attempt was made to regard these various considerations, as a rule the controlling influence was competition. What ever traffic managers would be glad to do, at the present time they do not, and perhaps cannot, consider in the making of rates much beyond actual competitive conditions. Originally these various factors entered to an extent into the freight rate, and under their operation schemes of rates and classifications were built up. Those classifications and class rates serve in a measure as the basis of rates at the present time, having been gradually modified by the action of competitive forces. Taking those as a basis, the traffic manager to-day obtains for his company all he can without much reference to any system upon which rates ought to be constructed. He gets usually the best rate possible, without inquiring any further than he may find it convenient what in fact justifies that rate."

Following the same line of thought, Mr. Commissioner Veazie, in Proctor & Gamble Company v. Cincinnati, Hamilton & Dayton Railway,[2] pointed out, in speaking of the classification committee, that, " It should not be overlooked that their training has been largely from the railroad standpoint and on this account their error, if either way, is more liable to be in favor of high rates. That they should always be exactly right is more than any earthly tribunal ever attained."

§ 563. **Adjustment of business to established classification.**

Since the classification of freights is the result of long experience, and business has become adjusted to it, the classification and rates will not be disturbed unless it is made clear that there is some tangible inequality involved and a fairer adjustment of rates is shown. As Mr. Commissioner Prouty said in Grain Shippers' Association v. Illinois Central Railroad:[3]

[2] 3 Int. Com. Rep. 131, 4 I. C. C. Rep. 87 (1890).
[3] 8 I. C. C. Rep. 158 (1899).

"Every article referred to by the complainants except live stock has been substantially the same since the Act to Regulate Commerce took effect. During all this time, and probably during a much longer time, traffic conditions and commercial conditions have been adjusting themselves to this relation of rates. Certainly this relation should not be disturbed until some intelligent opinion can be formed as to what should take the place of it. It is not enough to know that the present conditions are not ideal. It must further appear that something better is attainable."

§ 564. Classification according to manufacturer's representations.

In determining the true classification of goods offered for carriage the carrier may act upon the shippers' representations as to the nature of the goods. This was neatly brought out in a case where a manufacturer claimed that his soap, which was advertised extensively as toilet soap, should be classed not as toilet soap but as laundry soap.[4] He claimed that his soap was a cheap soap, and competed in the market with laundry soap; but as it had been extensively advertised as toilet soap it was necessary to call it toilet soap in order to have the benefit of the advertising. The Commission held that the railroads were right in classifying the soap according to the representation of its manufacturer. Mr. Commissioner Schoomacher said:

"And this is the attitude of the case in hand. The Commission is asked in the case of a particular article to order that its classification shall not be governed by what it purports to be but by what it is claimed to be in fact. An order of this kind would necessarily be general and apply in other cases. Besides, its effect would be to discriminate against the other articles which the one in question purports to resemble in quality and uses.

[4] Andrews Soap Co. v. Pittsburgh, C. & St. L., 3 Int. Com. Rep. 77, 4 I. C. C. Rep. 41 (1891), per Schoomacher, Commissioner.

"If, for example, an order were made that because a particular variety of soap represented to be a toilet soap by its manufacturer has in fact no higher market value, or quality superior, to soap classified as laundry or common soap, therefore it must be classified and carried as laundry or common soap, the manufacturers and shippers of other toilet soaps would very probably complain that undue preference and advantage are given to manufacturers benefited by such an order, and questions would be likely to constantly arise to determine the relative value of toilet soaps and of laundry soaps. The Commission is unable to see how it can properly or justly require carriers to analyze the freight offered to them, to ascertain its quality and its actual value, when those are claimed to differ from its trade designation and the price paid by the consumer. A rule of that kind would be altogether impracticable. The public is entitled to truthful representations respecting goods offered for sale. If an erroneous representation is essential to the sale of a commodity it is not inequitable that some burden should be a necessary consequence.

"When a manufacturer describes his article to the public for the purpose of making a market for it, he also so describes it for purposes of carriage, and it seems as reasonable that the carrier should have a right to accept the manufacturer's representation concerning his product as that the public should be influenced by it in the purchase of the article."

§ 565. Classification of various goods.

In Myer v. Cleveland, Cincinnati, Chicago & St. Louis Railway[5] the complainant, a manufacturer of hats, objected to the classification of hatters' furs as double first class. The Commission, comparing hatters' furs with the other articles classed in the same way, found that none of them "affords as desirable traffic as the one under consideration, and in only three or four

[5] 9 I. C. C. Rep. 78 (1901).

instances is their any approach to this." Comparing with articles in the first class, they concluded that "but very few of them are as desirable freight as hatters' furs and fur scraps and cuttings, and that none of them are more so. No special reasons were shown why these two commodities should pay a higher rate than other similar commodities." In reply to this, the carrier contended that "one commodity should not be compared with another unless the two are competitive; hatters' furs cannot therefore be tested by dry-goods or boots and shoes," and counsel argued that the main element in the determination of a classification is "value of the service," or "what the traffic will bear."

Mr. Commissioner Prouty, however, refused to follow this argument, saying: "Mr. Gill, Chairman of the Official Classification Committee, speaking both as a witness and as counsel for the defendants, asserts that the main element in the determination of a classification is 'value of service,' or 'what the traffic will bear.'

"There is undoubtedly much, we do not find it necessary to now inquire how much, truth in this contention of Mr. Gill; but it cannot be admitted that those are the only considerations to be observed. It has been repeatedly claimed by carriers and repeatedly held by the Commission that in the forming of a classification bulk, value, liability to damage, and similar elements affecting the desirability of the traffic should be considered, and that analogous articles should ordinarily be placed in the same class.[6]

"Manifestly in determining what freight rates shall be borne by different commodities an attempt should be made to obtain a fair relation between those commodities, and a classification which utterly ignores all considerations of this kind or which

[6] Warner v. New York C. & H. R. R. Co., 4 I. C. C. Rep. 32, 3 Int. Com. Rep. 74 (1892); Harvard Co. v. Pennsylvania Co., 4 I. C. C. Rep. 212, 3 Int. Com. Rep. 257 (1892); Page v. Delaware, L. & W. R. Co., 6 I. C. C. Rep. 548 (1894).

utterly fails to give due weight to such considerations is unjust and unreasonable."

§ 566. Difference between forcing classification on railroads and justifying classification by railroads.

In the discussion of classification it is to be noticed that the question is not what classification the judges would make if they were acting as a committee to frame a schedule; the question is rather whether the classification adopted by the carrier can be justified. In the cases in which classification is discussed, therefore, the court has to determine not whether it could imagine a better classification, but whether it should overthrow the adopted classification as clearly unreasonable. This was well expressed by Mr. Chairman Knapp in Planters' Compress Company v. Cleveland, Cincinnati, Chicago & St. Louis Railway:[7]

"It seems plain that a distinction should be drawn between the legal obligation of carriers and the discretion which they may rightfully exercise. We do not doubt that it would be lawful for these defendants and other carriers to establish carload and less than carload rates on cotton, with a reasonable difference between the two rates and a reasonable minimum which would secure to shippers the lower carload rates; but it does not follow that they are bound to do so, much less that they can be required to establish a differential based upon an unusual carload minimum."[8]

[7] 11 I. C. C. Rep. 382, 409 (1905).

[8] Prouty, Com. dissenting, seems to agree on this point (p. 411): "In view of the wide limits within which carriers may properly regulate their own business we should perhaps hold that these defendants may apply the same rate to the transportation of cotton, compressed or uncompressed, in carloads or in less than carloads."

TOPIC C—BASIS OF CLASSIFICATION: COMPARISON OF COMMODITIES.

§ 567. The reasonableness of a particular rate involves reasonableness of classification.

It is the recognized legal duty of the carrier so to classify traffic and fix charges thereon that the burdens of transportation shall be reasonably and justly distributed among the articles they carry.[1] That is the governing principle of a freight classification, and it arises under the obligation imposed upon carriers by the statute not to charge unreasonable or unjust rates or to impose any unjust discrimination or undue prejudice in any respect whatsoever. It is evident therefore that even in cases where the need of additional revenue is apparent the carrier cannot arbitrarily select some one or more articles upon which to apply higher rates regardless of the relation which such article or articles bear to other commodities commonly offered for transportation.[2] A general advance or diminution of all freight rates involves a question only of the reasonableness of the return from the whole tariff schedule; and even an advance of rates for a whole class of commodities involves principally only a question of the reasonableness of the rate as a whole. But if the rate charged upon a particular commodity is in question, the decision involves a comparison with other commodities. It must be determined whether the commodity is properly classified in comparison with other commodities.

"If the defendant carriers had advanced all of their class rates, in case of complaint against the increased rate upon any particular article the reasonableness of such higher charge

1 Page v. Delaware, L. & W. R. R., 4 Int. Com. Rep. 525, 6 I. C. C. Rep. 148 (1894); Myer v. Cleveland, C. C. & S. L. Ry., 9 I. C. C. Rep. 78 (1901); National Hay Assoc. v. Lake Shore & M. S. Ry., 9 I. C. C. Rep. 264, 304 (1902).

2 Clements, Com. in National Hay Assoc. v. Lake Shore & M. S. Ry., *supra*.

might well have been the principal question; but what these defendants did on January 1, 1900, was to increase the classification rating and consequently the rates upon numerous commodities selected by them from the classification, including hay and straw, and by such action they laid themselves open to the additional charge of having subjected such higher rated traffic and those interested in it to undue prejudice and unjust discrimination." [3]

§ 568. Classification not determined by consideration of rate on a particular commodity.

While as a general principle it is clear that each shipper in the case of any particular shipment is entitled to a rate no greater than is reasonable for that shipment, it is equally true that if a shipper complains of the *classification* of the goods he offers for shipment the justice of his complaint cannot be determined by considering merely the effect of such classification on the rate charged for the particular shipment in question. Classification by its very nature involves the relation of one commodity to all others; and comparison with other commodities is therefore essential to any scheme of classification.

"An attempt to reform a classification by a selection of isolated cases and single classes, and changing them without a study of the entire scheme, would be dangerous. The entire effect of a proposed change can only be known by comprehending the relation of each particular article or class to the combined scheme. Therefore a complainant asking a change in classification, as in this case, with reference to a single group of articles, should be required to show a case of unjust discrimination or wrong done to procure a change." [4]

[3] Clements, Com. in National Hay Assoc. v. Lake Shore & M. S. Ry., 9 I. C. C. Rep. 264, 304 (1902). See Interstate Com. Com. v. Lake Shore & M. S. Ry., 134 Fed. 942 (1905).

[4] F. Schumacher Milling Co. v. Chicago, R. I. & P. R. R., 6 I. C. C. Rep. 61, 67 (1893).

In the Window Shade case,[5] at the rehearing before the Interstate Commerce Commission it was insisted that if the rates involved in the complaint against the classification of window shades are not shown to be unjust and unreasonable in themselves,—that is, practically without reference to rates charged by the roads on other commodities,—they ought not to be reduced. The Commission, however, held that "rates must bear just relation to each other as well as be reasonable *per se*."[6]

The aim of the investigation, the Commission added, "is not to ascertain how high classification or rates the affected industries will stand; the purpose of such investigations is to determine the duties of carriers and the rights of shippers and the public under the law."

§ 569. Elements in comparison of commodities.

Freight classification is based upon the relations which commodities bear to each other in such respects as character, use, bulk, weight, value, tonnage or volume, risk, cost of carriage, ease of handling and controlling conditions caused by competition.[7] It will be noticed that all these considerations, except the last, are concerned with the nature of the commodity itself; either its material qualities or its use. They affect either the cost or risk of carriage to the carrier, or the value of carriage to the shipper. It is plain therefore classification is a method of rate making based upon all the principles governing the estab-

[5] Page v. Delaware, L. & W. R. R., 6 I. C. C. Rep. 548, 556 (1894).

[6] Citing Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co., 4 Int. Com. Rep. 65, 5 I. C. C. Rep. 264 (1892); James v. Canadian P. R. Co., 4 Int. Com. Rep. 274, 5 I. C. C. Rep. 612 (1893); Raymond v. Chicago, M. & St. P. R. Co., 1 Int. Com. Rep. 627, 1 I. C. C. Rep. 230 (1887); Boards of Trade Union v. Chicago, M. & St. P. R. Co., 1 Int. Com. Rep. 608, 1 I. C. C. Rep. 215 (1887).

[7] Proctor & Gamble Co. v. Cincinnati, H. & I. Ry., 9 I. C. C. Rep. 440, 482 (1903).

lishment of particular rates [8] which have been discussed in the preceding chapter.

§ 570. Comparison of similar things.

The comparison commonly instituted is that between similar things, for the purpose of placing them in the same class. Thus the following articles have upon comparison been ordered placed in the same class: rasins and dried fruit;[9] rye or barley and wheat;[10] envelopes for correspondence and merchandise envelopes;[11] cowpeas and seed-grain.[12]

§ 571. Vegetables for table use.

Celery was compared with other vegetables for table use, and it was concluded that it should be classified with such vegetables rather than with perishable fruits.

"It is a matter of general knowledge that during recent years, and especially since the change in classification mentioned in the complaint, celery has come into much more common use. Its production has greatly increased and its market value has declined. It certainly is no more a table luxury than some of the vegetables which have a lower class in the Western Classification. As varied or qualified by the foregoing, the facts stated in the petition are found to be true, and we hold that the complainant is entitled to the relief claimed.

"For that portion of its line over which the Western Classification is in force the Wabash road should class celery with cauliflower, asparagus, lettuce, green peas, string beans, oyster

[8] See Grain Shippers' Asso. v. Illinois Central R. R., 8 I. C. C. Rep. 158 (1897).

[9] Martin v. Southern Pac. Ry., 2 Int. Com. Rep. 1, 2 I. C. C. Rep. 1 (1889).

[10] Cannon Falls F. E. Co. v. Chicago, G. W. R. R., 10 I. C. C. Rep. 650 (1905).

[11] Wolf Brothers v. Allegheny Valley R. R., 7 I. C. C. Rep. 40 (1897).

[12] Swaffield v. Atlantic Coast Line, 10 I. C. C. Rep. 281 (1904).

plant, egg plant, and other vegetables enumerated in Class C of that classification, rather than with berries, peaches, grapes, and other fruits specified in Class III. thereof, and the defendants should transport celery from Tecumseh to Kansas City at no higher rate per carload than they charge for carrying a carload quantity of any of said vegetables named in Class C aforesaid."[13]

§ 572. Perishable articles of food.

Eggs were held properly classed with fruit and other perishable articles of food in the case of Brownell v. Columbus, Cincinnati & Midland Railway.[14] Mr. Commissioner McDill said:

"The egg is a delicate and perishable commodity. Though methods adopted for its preservation retard the decomposition to which it is subject, they do not prevent the article from taking on that musty and strong flavor so often noticed in 'stored eggs.' While not as perishable as the small fruits mentioned, yet, considering the delay which is necessary in the accumulation of sufficient lots for sale or sending to market, its inherent liability to early decay, and the fact that 'fresh eggs' are commonly held to be an indispensable food article in every household, it must be deemed sufficiently perishable to be classed with articles of that character. In the official classification eggs, any quantity, are classed as low as berries in carloads, fruit in carloads, not otherwise specified, and butter and cheese in any quantity; and they are given a lower class than poultry, game, peaches, or oysters, not in the shell. These commodities, though diverse in character, are all perishable food products and particularly subject to deterioration after short lapses of time and under climatic influences. Considered as a perishable article eggs cannot be deemed to have an unfavorable classification; they are classed lower than some, and no higher than any, of the articles above mentioned."

[13] Veazie, Commissioner, in Tecumseh Celery Co. v. Cincinnati, J. & M. Ry., 4 Int. Com. Rep. 318, 5 I. C. C. Rep. 663 (1893).

[14] 4 Int. Com. Rep. 285, 5 I. C. C. Rep. 638 (1893).

§ 573. Groceries.

A comparison of soap with other articles commonly sold by grocers was thus made by the Commission: "The fifth class of the Official Classification contains over 2,000 articles, and includes soap and many other grocery articles, such as canned fruits and vegetables, candles, cabbage, pickles, potatoes, pumpkins, parsnips, squash and turnips, chicory, citron, lemon and orange peel, desiccated cocoanut, coffee, fruit butters, jelly, sauce, soap and washing powders, macaroni, vermicelli, flour paste, mustard, olives, pickle or brine, soups and broths, sugar, syrup and tapioca. Numerous other articles sold by grocers or in general stores are also in the fifth or higher classes.

"Although soap is most desirable traffic for the carriers, it is not a species of traffic which like hay or grain moves in very large aggregate quantities, nor is it so low in value as to call for the lowest class rating on that account. It is a widely manufactured article sold with other general merchandise, and, unlike the principal food staples which move in greatest volume from the West to the East, it is shipped from the factory in all directions and meets the products of other factories in all markets. The soaps of New York and Chicago manufacturers sell in Cincinnati in competition with complainant's products, and the latter in turn are sold in Chicago as well as New York and other extreme eastern cities and towns. This condition is more or less common to other general merchandise articles which are produced in various parts of Official Classification territory. Without some showing of discrimination against soap in its classification as compared with other articles of the same general character, or any special distinction appearing in favor of soap in either volume, value or controlling commercial considerations, we are unable to find simply because it is a desirable article of traffic for the roalroads in the matter of earnings and ease of handling that it is unjust to retain it in class 5 with other articles of like character, some

of which are equally as attractive as soap from the standpoint of car revenue."[15]

§ 574. Articles shipped in glass.

A comparison of articles shipped in glass was made, upon complaint of the proprietor of a patent medicine who desired a lower classification. The Commission said: "By this classification it takes the rates of the other kinds of property in the class. These consist largely of articles in glass packed like the bitters in boxes for transportation. Among them are: acids, apple or fruit butter, bromine, cider, coffee condensed, drugs and medicines, honey, ink, liquors or liquids, milk food, oils, paints, pickles, prunes, syrup, and a variety of others. There is no apparent injustice in classifying the bitters with such articles. And a rate that is reasonable for the class is reasonable for an article properly included in the class. The petitioners suffer no injustice, therefore, peculiar to themselves, from the classification of their goods. If the classification of their bitters should be changed the same reasons would compel a like change of a large number of similar articles." [16]

§ 575. Forest products.

Forest products not entirely manufactured have been compared and placed in the same class. Thus lumber and railroad ties should have the same classification;[17] so box shooks should be classified with lumber, laths and shingles;[18] and hub blocks should be classed with lumber instead of with wagon materials.[19]

[15] Proctor & Gamble Co. v. Cincinnati H. & D. Ry., 9 I. C. C. Rep. 440 (1903), per Knapp, chairman. See Thurber v. N. Y. C. & H. R. R. R., 2 Int. Com. Rep. 742, 3 I. C. C. Rep. 473 (1890).

[16] Myers v. Pennsylvania Co., 2 Int. Com. Rep. 403, 2 I. C. C. Rep. 573 (1889).

[17] Reynolds v. Western N. Y. & P. Ry., 1 Int. Com. Rep. 688, 1 I. C. C. Rep. 393 (1888).

[18] Michigan Box Co. v. Flint & P. M. R. R., 6 I. C. C. Rep. 335 (1897).

[19] Hurlbut v. Lake Shore & M. S. Ry., 2 Int. Com. Rep. 81, 2 I. C. C. Rep. 122 (1888).

Shingles were compared with other lumber products, and it was held that they should be in the same class. "Generally speaking the demand for and use of shingles as building material are quite as important and general as for any other lumber product, and the necessity is equally as great that such product shall be charged only a reasonable and equitable rate for its transportation. Shingles being put up in bundles for shipment the work of handling is facilitated so that no more, and perhaps even less, labor is required than for the handling of many other lumber products classed with and charged the same transportation rate as lumber, such as laths, shooks, sawdust, box and moulding material and other stuff of the regular dimensions. The weight of shingles that can be loaded in a car will also compare favorably with the above named and many other lumber products taking the lumber rate. No testimony has been submitted as to the relative values of these various products, but it may be assumed safely, that shingles are worth as much per carload as the average of articles taking the lumber rate. No claim has been made that there is any greater risk in shipping shingles than any other article included in the lumber classification." [20]

§ 576. **Dry goods.**

Window shades and various articles of dry goods were thus compared: "In the elements of bulk, weight and value, several of the dry-goods articles described in the table set out in the sixth finding as taking third class rates have greater similarity to a 23-dozen case of finished shades than exists between such a case of shades and the first-class articles mentioned in that table. There is, however, little analogy in uses or character between window shades and the dry-goods articles referred to. With the exception of lace curtains, these articles are dry-goods in the piece; and lace curtains are in the category of ornamental house furnishings, while the window shade is regarded as

[20] Yeomans, Com. in Duluth Shingle Co. v. Duluth, South Shore & Atlantic Ry., 10 I. C. C. Rep. 489, 504 (1905).

a household necessity. But the fact that both shades and lace curtains are in the first class, the latter many times more valuable, is an element to be noted, though against this it must be considered that many incongruities are unavoidable when the carriers undertake, as they do by the Official Classification, to divide the great mass of freight articles into practically six classes; and the desirability of simplicity in the classification is a feature which should not be overlooked. The items of similar bulk and weight, less value and risk of carriage, and important volume of traffic, are all in the direction of giving to window shades a classification as low as that which is provided for window hollands."[21]

§ 577. Comparison of unlike things.

Unlike things may be compared to determine the correctness of the classification of one of them. With so few classes into which all commodities must be placed, it is obvious that not all articles in a single class will be similar in their nature; and unlike things may after comparison be held to belong in the same class. More commonly, because of the unlikeness, they will be held properly to be placed in different classes.

Thus in the important case of Tift v. Southern Railway,[22] the railroad attempted to institute a comparison between the classification of lumber and that of oranges, pineapples, watermelons, peaches and other fruit, rosin, turpentine, pyroligneous products, cotton seed oil, and cotton factory products. The obvious difference was, however, pointed out by the Commission. "Lumber is much less valuable per weight than most, if not all, the above articles and its volume is many times greater. The larger portion or nearly all of the above articles are what are termed perishable and, therefore, involve greater risk and greater cost in handling than lumber. The rates on lumber,

21 Veazey, Com. in Page v. Delaware, L. & W. R. R., 4 Int. Com. Rep. 525, 6 I. C. C. Rep. 148, 170 (1894).

22 10 I. C. C. Rep. 548 (1905).

therefore, should be not only not as high as, but materially less than, the rates on those articles."

Similarly, upon a comparison, it was held that there was such dissimilarity as to justify a different classification of bricks and ice,[23] of soap and hay,[24] of cowpeas and fertilizers,[25] of low grade steam coal and more costly domestic grades,[26] of salt and grain,[27] of patent medicines and lager beer,[28] of flour in barrels and breakfast foods in packages.[29]

§ 578. Differences between commodities.

When articles are plainly different in character, they are rightly put in different classes. In a case where it was attempted to compare salt and grain[1] the Commission said: "There is no sufficient similarity between salt and grain to make a comparison in any degree instructive. Salt moves in quantities sufficient to supply the entire demand, from widely separated points of production to common intermediate points of consumption. Grain moves, as a rule, in one direction only to the general markets of the world and the demand is practically unlimited. The markets for grain will usually absorb the entire supply and the lowering of rates on grain inures largely to the producer of grain. A reduction in salt rates to the interior of Iowa and Missouri could not have such an effect. The market is necessarily limited. Disturbing rates would, as we have shown, lead to corresponding reductions as to the other

[23] Fitchburg R. R. v. Gage, 12 Gray (Mass.), 393, B. & W. 354 (1859).

[24] Proctor & Gamble Co. v. Cincinnati H. & D. Ry., 9 I. C. C. Rep. 440 (1903).

[25] Swaffield v. Atlantic Coast Line, 10 I. C. C. Rep. 281 (1904).

[26] Com. v. Louisville & N. R. R. (Ky.), 68 S. W. 1103 (1905).

[27] Anthony Salt Co. v. Missouri Pacific Ry., 4 Int. Com. Rep. 1 (1892).

[28] Myers v. Pennsylvania R. R., 2 Int. Com. Rep. 403, 2 I. C. C. Rep. 573 (1889).

[29] Schumacher Milling Co. v. Chicago, R. I. & P., 6 I. C. C. Rep. 61 (1895).

[1] Anthony Salt Co. v. Missouri Pac. Ry., 4 Int. Com. Rep. 1, 43 (1892).

competing field, so that a reduction will not give any profit or any greater market in the end to the Kansas producers. Natural causes and forces ought to have full sway. The public mind has condemned what it has believed to be the attempt of railway managers to interfere with them. Commissions and other bodies in regulating transportation should, as far as possible, avoid the same error."

But if the difference is not great, an identical classification will not be disturbed. So where a railroad placed milk and cream carried in bottles, in the same class, the Commission said:[2] "That it makes no lower charge on milk than on cream may be open to some criticism, but its rate on milk is already reasonably low, and we do not feel inclined to disturb its schedule on that account. No order will now be entered as against that company."

TOPIC D—CONVENIENCE IN HANDLING.

§ 579. Classification based on nature and size of package.

It seems to be true as a general principle that a shipper should be left free to ship in such package as suits his convenience, and therefore that a classification based on kind or size of package is improper. So where the carriers attempted to classify eggs carried in "returnable cases," that is, cases substantially built and comparatively expensive, lower than eggs carried in cheaper cases, though as a matter of fact the cheaper cases served their purpose equally well and caused no additional trouble or expense to the carrier, the Interstate Commerce Commission held the proposed classification invalid. A shipper, the Commission said, should not be subjected to unnecessary restrictions as to the kind of case he should use.[3]

[2] Milk Producers' Assoc. v. Delaware, L. & W. R. R., 7 I. C. C. Rep. 173 (1896).

[3] Rhode Island E. & B. Co. v. Lake Shore & M. S. Ry., 4 Int. Com. Rep. 512, 6 I. C. C. Rep. 176 (1894).

§ 580. **Shipment in small packages.**

So an attempt to give a higher rating to goods commonly shipped in small packages seems not to be proper. In the case of Page v. Delaware, Lackawanna & Western Railroad, when first before the Interstate Commerce Commission,[4] the distinction between the classification of window shades and that of uncut hollands was justified by the carriers by the fact, among others, that hollands were seldom shipped in small packages, while shades were frequently so shipped. The Commission, however, pointed out that very little additional labor was involved in handling the same weight in small and in large packages; the comparatively light 25-pound package may be easily and quickly handled, while a case weighing approximately 500 pounds is a heavy and cumbersome article. And they finally decided that, considering the rule of charging for one hundred pounds on shipments of less weight, the ease with which small packages containing non-breakable material can be handled, the fact that the carriers do not make a distinction in classification between small and larger packages, and that mathematical exactness in rating is impracticable, the single circumstance of frequent shipment in small packages should not outweigh the reasons for a change in window shade classification to third class.

§ 581. **Shipment in form more convenient for handling.**

Where the form of package results in a saving of expense to the carrier by reason of greater convenience of handling, a higher classification for the less convenient form of shipment will be justified. This question was considered in the case of the Trades League of Philadelphia v. Philadelphia, Wilmington & Baltimore Railroad.[5] In that case it appeared that iron pipe fittings shipped in cases from northern points to southern

[4] 6 I. C. C. Rep. 148, 172 (1894).
[5] 8 I. C. C. Rep. 368 (1899).

territory took second-class rates, but if shipped in casks, barrels or kegs a special iron rate, lower than the sixth-class rate, was applied on any quantity. The barrel package was cheaper than the case, except when the quantity was insufficient to fill a barrel; but when that happened a keg could be used for packing, with but little inconvenience or additional expense, and the lower special iron rate was thereby secured. The choice was wholly with the shipper to pay the higher rate on fittings in cases or the lower rate on fittings in kegs or barrels. Such a classification did not operate of itself to aid dishonest shippers in underbilling goods of greater value, and the opportunity for false billing would not be lessened by giving the special iron rate to pipe fittings packed in cases. No ground of distinction appeared in this respect between pipe fittings and numerous other articles included in the special iron list and taking higher rates when packed in boxes, and reclassification of all these other commodities was not warranted by the facts in this case. It was held that the defendant carriers had not exceeded the limits of their discretion in placing iron pipe fittings packed in cases in a higher class than iron pipe fittings packed in kegs or barrels, and that such action was not unreasonable or otherwise in violation of the Act to Regulate Commerce.

The Commission pointed out that "the barrel package is preferably used in the ordinary course of business because of its comparative cheapness. Even at the same or approximately equal rates boxes would not ordinarily be used, except when the quantity to be separately packed is insufficient to fill a barrel. In such a case the goods can be placed in a keg without much inconvenience or additional expense, and it can hardly be considered burdensome to require that kind of package if shippers desire to forward small lots at the special iron rate. The carrier offers that rate to all persons and on all quantities, *provided* the articles are sent in packages of barrel form; otherwise a higher rate is charged. The lower rate is not allowed for some

exceptional or expensive mode of shipment, but on the package long in general use and apparently favored by shippers irrespective of rates, because of its suitability for the purpose and the low cost for which it can be procured. As the choice is wholly with the shipper it cannot be a hardship for him, under the circumstances disclosed, to pay the higher rate when he elects to pack his goods in cases."

Upon the same ground the Commission held that milk shipped in cans, by which method it could be carried more cheaply, ought, other things being equal, to have a lower rating than milk carried in bottles.[6]

And the Court of Civil Appeals of Texas even held invalid a contract to carry hogs at the same rate in single-deck cars as in double-deck.[7]

§ 582. Shipment in form permitting greater car load.

On the same principle it would seem that if goods are so compactly shipped that more can be carried in a single car, a lower classification should be given them. This was claimed by the complainant in the case of the Planters' Compress Company v. Cleveland, Cincinnati, Chicago & St. Louis Railway.[8] The complainant offered for carriage round bales of cotton so closely compressed and in such a form that twice as much cotton could be loaded and carried in a single car as could be loaded and carried in the ordinary form. While, as was pointed out, this did not increase the total amount of cotton carried, it certainly decreased the expense of carrying such total amount. Notwithstanding this fact, the majority of the Commission held that the complainant was not entitled to a

[6] Milk Producers' Protective Assoc. v. Delaware, L. & W. R. R., 7 I. C. C. Rep. 92, 169 (1897).

[7] Houston & T. C. R. R. v. Dumas (Tex. Civ. App.), 43 S. W. 609 (1897).

[8] 11 I. C. C. Rep. 382 (1905). See, however, Railroad Commission of T. v. Houston & T. C. Ry., 16 Tex. Civ. App. 129, 40 S. W. 1052 (1897).

lower classification. The most important argument in favor of the decision is that the method of compression was expensive and was not open to everyone, and that it was therefore improper to give an advantage to the comparatively few shippers who could use it. This argument is sound, and is probably sufficient to justify the decision; and it has no bearing, of course, on the point now under discussion. The arguments by which the majority of the Commission supported their further opinion that a classification based on the greater facility of shipment in round bales was not required are hardly convincing.

§ 583. Classification based on volume of business.

A difference in classification based on the amount of a shipment, or the number of shipments, where the amount does not lead to any economy of management on the part of the carrier, is not justifiable. Thus a difference of classification of surgical chairs and sewing machines, based on the fact that few surgical chairs and many sewing machines are offered for carriage, is improper.[9] Mr. Commissioner Bragg said in such a case:

"The mere fact that one article, for example, sewing machines, is shipped 'in greater quantities' than surgical chairs, when each as a rule is shipped in less than carload quantities, and of no large difference in bulk, weight and value, and of no appreciable difference in expense of handling and of haul, that this alone should constitute in itself any reason why the former should enjoy lower rates or classification than the latter, merely for the reason that they are shipped 'in greater quantities,' is a doctrine to which we cannot give our assent. In such a case mere quantity, not measured by a recognized unit of quantity adapted to carriage and lessening the expense of handling and carriage, cannot be allowed to affect rates in

[9] Harvard Co. v. Pennsylvania Ry., 3 Int. Com. Rep. 257, 4 I. C. C. Rep. 212 (1890).

the transportation of property. The small dealer is entitled to just and reasonable rates on his product, as much so as many and large dealers, and any discrimination between them in rates based upon the idea that the one class of persons makes many shipments while the other makes but few is unjust and unreasonable under the Act to Regulate Commerce. It is a discrimination in favor of one kind of traffic as against another in the vital matter of rates, and is unlawful.

"The same doctrine found in occasional loose judicial dicta, to the effect that a carrier under such circumstances may make 'concessions' in rates in favor of a 'large as against a small quantity of freight,' or of a 'party' of a given number of persons, as against a 'single person,' upon the idea that there is 'a wholesale and retail principle' involved in it, is a doctrine at war with the fundamental purpose of the Act to Regulate Commerce, which has for one of its main objects the protection of the weak as against the strong, and destroys the establishment of proportional equity and justice. These dicta, if given full effect, would undermine this fundamental purpose, and give to combinations and schemes for securing advantages over single individuals a power that would shut out all small competition and put the weak at the mercy of the strong at every turn where railway transportation became a matter of moment in business transactions."

§ 584. Large volume of traffic in a certain commodity.

But though such a difference as that just examined will not justify a difference in classification, the case is entirely different where the volume of traffic in a certain commodity is so great as to justify a certain special method of handling it. Thus the enormous traffic in grain in the west justifies a special classification for it; and so the vast traffic in lumber in Georgia should be considered in the classification of that commodity.[10] So the

[10] Tift v. Southern Ry., 138 Fed. 753 (1905).

great volume of shipments of flour as compared with other cereal products justifies a lower classification of flour.[11]

§ 585. Volume of traffic in general considered.

The volume of traffic which may be considered, as has been seen, is the entire traffic in the commodity in question. It is not permissible to consider the amount of traffic furnished by a single shipper. As Mr. Commissioner Schoonmacher said in the case of Warner v. New York Central & Hudson River Railroad:[12] "The volume of traffic implies only the extent to which a particular article has become a subject of transportation, and does not imply that a large shipper of the same or like traffic can have any advantage over a shipper of smaller quantities. Like traffic of large shippers and of small shippers must have the same classification for carloads and the same for less than carloads."

§ 586. Perishable freight.

It is obvious that perishable freight may be placed in a higher class than non-perishable goods of the same general nature. It requires special care in the carriage, greater speed, and special equipment, and the risk of loss to the carrier is greater. The transportation of fruit is of this nature, and a high special classification is permissible. In a case which involved the classification of bananas, the Commission said: "The kind of service required in the transportation of bananas is a somewhat exacting one. While not usually carried under refrigeration, a special ventilated car is needed. They must be handled with great expedition and in point of fact the Southern does transport them from Charleston to Richmond and Lynchburg and inter-

11 Schumacher Milling Co. v. Chicago, R. I. & P. R. R., 6 I. C. C. Rep. 61. See, to the same effect, Knapp, Chairman, in Proctor & Gamble Co. v. Cincinnati H. & D. Ry., 9 I. C. C. Rep. 440 (1903).

12 3 Int. Com. Rep. 74, 4 I. C. C. Rep. 32 (1890). See Chapter XXII.

mediate points by an express freight service which approximates a passenger schedule, The liability to damage is considerable, and it appears that claims for damage are frequently made." [13]

So in the case of melons, the Commissioner said: "Melons being perishable, rapid transit and prompt delivery are of the first importance and where the carrier renders a special service a higher rate than for the carriage of ordinary freight is warranted. The defendants furnish special trains for the melon traffic and undertake to make quick movement and speedy delivery." [14]

§ 587. Traffic handled in special trains.

This general subject was considered at length in connection with the classification of peaches carried to market on special trains. The complaint was made by shippers of peaches from Delaware to New York. The traffic was moved in separate trains from other freight, and at a high rate of speed. The freight moved, according to the evidence, at about 28 to 30 miles an hour, which did not include the time at stations. Notwithstanding the speed at which the trains were moved, the time required to reach Jersey City from the Peninsula was 12 hours and upwards. Respondents estimated the cost of movement of this traffic at about double that of ordinary freight. Empty cars in this trade were returned at the same rate of speed. They carried no return loads. Cars used for general freight ordinarily carry return loads and make slow time, and the usual earnings of such a car are five dollars a day. The Commission held that the peculiar needs of this service, requiring the withdrawal of cars for a period of two months or more from other service, the special fitting up of the cars for the carriage of the freight, the high rate of speed at which the trains are run in order to make early delivery at the markets, the greater wear

[13] Gardner v. Southern Ry., 10 I. C. C. Rep. 342 (1904).

[14] Loud v. South Carolina Ry., 4 Int. Com. Rep. 205, 5 I. C. C. Rep. 529 (1892).

and deterioration to the cars, tracks and bridges by the increased rate of speed and the return of the cars empty, also at high speed, justifies a considerably higher rate than for ordinary freight." [15]

The Commission said that the most material feature in fixing the rating was the speed; which was not confined to the loaded cars, but also included the return of the empty cars, and was therefore a service in both directions. Other peculiar elements of equipment and service were pointed out as justifying the special classification. "The expense of fitting up the cars specially for the service is an item for which the carrier is fairly entitled to remuneration. The fitting up is necessary to no other traffic but is peculiar to this traffic, and is laid aside when the cars are taken out of this business. A very small addition to the rate will, however, compensate for this expense. The withdrawal of the cars from other service except while lying idle is perhaps not a feature of controlling importance. A car is usually put in service by a carrier where it will earn most revenue, and can only be in service at one place at the same time, and not in two or more places. But the loss of revenue from cars while being fitted for this service, and again fitted for their usual service, and while reserved for this business, is fairly a part of the carrier's expense, and a legitimate item to enter into the rates. The loss from the return empty of the cars is also a legitimate consideration."

§ 588. **Special equipment not necessary for the traffic.**

If, however, the carrier provides a special equipment not because it is required by the nature of the traffic, but for its own convenience, or to attract patronage in competition with a rival, the fact that the article is thus carried does not justify high classification. This was held in the case of oranges. In the case of the Railroad Commission of Florida v. Savannah,

[15] Delaware State Grange v. New York, P. & N. R. R., 3 Int. Com. Rep. 554, 2 I. C. C. Rep. 309 (1888).

Florida & Western Railroad[16] it appeared that the transportation of oranges received special care and attention from the defendants. Cars and steamers were ventilated; trains were run on fast schedules which limited the number of cars and increased the consumption of coal, and extra accommodations and employes were provided at shipping, junction and terminal points. Moreover, most of the cars engaged in this traffic by the all rail lines returned empty, and the cars carrying oranges north were not loaded to their full capacity, the average load not exceeding nineteen thousand pounds. The service, therefor was more expensive than that rendered in connection with ordinary freight. Nevertheless, the Commission found that oranges were not perishable, and that this special care was unnecessary to their preservation; and thereupon held that it would not justify a high classification.

The Commission said: "It does not appear that the rapid service and special agencies employed in the carriage of oranges are necessarily required by the nature of the commodity. While spoken of as 'perishable' in the testimony of the carriers, it is evident that this characterization is correct only to a limited extent. As is well known, oranges in considerable quantities are shipped by rail across the continent, and brought here also in numerous cargoes by slow vessels from the Mediterranean and other countries. It is an exceptionally hardy fruit and well adapted to long transportation. The shipment is made in packages of convenient size for safe and rapid handling, while in weight, as compared with bulk, it furnishes a relatively high tonnage for the space occupied. In general desirability as freight it differs widely from those more delicate and short lived products which must be speedily consumed after they are gathered, and which, from their inherent qualities, are ordinarily rendered valueless by accident or delay in transit. Therefore, the special facilities provided by the defendants for the trans-

[16] 3 Int. Com. Rep. 688, 5 I. C. C. Rep. 13 (1891).

portation of perishable freight can hardly be claimed, so far as the orange traffic is concerned, to have been added to their general equipment solely because that traffic of necessity demanded high-speed trains and unusual conveniences of delivery. The more probable reason is found in the competition between the different lines and their desire to secure a business so important in volume and so desirable in character."[17]

§ 589. Less than usual care required.

Conversely, where the commodity requires less than ordinary care that fact is to be considered in lowering its classification. In Denison Light & Power Company v. Missouri, Kansas & Texas Railway,[18] the question was as to the proper classification and rating of coal. Mr. Commissioner Prouty said: "Coal is among the most desirable kinds of traffic. The reasons for this have been several times stated by the Commission and need not be repeated here in detail. The cost of receiving, transporting and delivering that commodity is less than in case of almost any other article of freight. Its value is not great, the hazard of loss in transit is insignificant, it is an article of universal necessity in daily life, and as a steam fuel it furnishes the basis of many other industries. Coal rates in this country are usually highly competitive, and this fact, together with its desirability as traffic, and the large quantities which are moved have produced on the average a very low late."

Similarly in Tift v. Southern Railway, both before the Cimmission[19] and in the Circuit Court,[20] stress was laid on the fact that lumber could be carried without special equipment on any car to justify a low rating for that commodity.[21]

17 Railroad Com. of Florida v. Savannah, F. & W. R. R., 3 Int. Com. Rep. 688, 700, 5 I. C. C. Rep. 13 (1891.)

18 10 I. C. C. Rep. 337 (1904).

19 10 I. C. C. Rep. 5 (1904).

20 138 Fed. 753 (1905).

21 *Acc.* Central Y. P. Assoc. v. Illinois C. Ry., 10 I. C. C. Rep. 505 (1904).

TOPIC E—VALUE OF THE GOODS.

§ 590. Value of the goods as an element in determining classification.

The element of value in the commodity transported forms a proper consideration to be taken into account in the establishment of rate, since the greater the value the greater the carrier's liability as an insurer of freight, and the greater, therefore, the risk to the carrier in the transportation. Since the risk is greater, the cost of carriage increases by the amount of compensation for the greater risk; and it is therefore proper to give more valuable goods a higher classification than less valuable goods.[1]

But the increased rating given to articles because of greater value must be not much more than is proper for the increased risk; when value is brought in as an element in classification, the classification cannot, nevertheless, be determined arbitrarily. "Value is undoubtedly an element which should be considered in the fixing of rates. It is often a most important element, but plainly cannot be made an arbitrary standard independent of all other considerations."[2]

§ 591. Difference between values justifies difference in classification.

So where two similar articles are compared, a difference in classification may be justified merely because of a difference in value. Thus where a complaint was made because other cereal products were given a higher classification than flour, the Commission said: "The question presented by complainant is, whether the other cereal products exceeding flour in value, the

[1] Howell v. New York, L. E. & W. R. R., 2 Int. Com. Rep. 162, 2 I. C. C. 272 (1888); Interstate Commerce Comm. v. Delaware, L. & W. R. R., 64 Fed. 723 (1894).

[2] Prouty, Com. in Grain Shippers' Assoc. v. Illinois Cent. R. R., 8 I. C. C. Rep. 158 (1899).

highest 68.2 per cent., the lowest 9.1 per cent., and giving an average excess in value of 33.4 per cent., should take the *same classification,* and therefore the same rate, as flour, values alone being considered?

"It is a conceded rule of classification that value, on account of enhanced risk and ability to pay a greater proportion of the aggregate return upon investment, may justify a higher classification, and in view of this rule the difference in values here shown is sufficiently great to justify the conclusion that the comparison as to value alone furnishes no sufficient reason for a classification with flour."[3] And upon the same principle, when it was claimed that a different classification on milk and cream, carried in the same sized can, could not be reasonable, the Commission pointed out that the element of value in the commodity transported forms a proper consideration to be taken in to the account in the establishment of a rate, and justified the difference because of the great difference in value between milk and cream.[4]

§ 592. Different classification of anthracite and bituminous coal.

Upon the ground of difference in value a different classification of bituminous and anthracite coal has been justified. Thus in the case of Cox Brothers & Co. v. Lehigh Valley Railway,[5] Mr. Commissioner Morrison said: "The grounds upon which we are asked to find these two coals to be the same freight, a like kind of traffic, is that they are loaded, unloaded and transported in the same way and substantially at the same expense to the carrier, and are largely used for the same purposes, though one half or more of the anthracite is used for domestic purposes.

[3] McDill, Com. in Schumacher Milling Co. v. Chicago, R. I. & P. R. R., 6 I. C. C. Rep. 61 (1895).

[4] Howell v. New York, L. E. & W. R. R., 2 Int. Com. Rep. 162, 2 I. C. C. Rep. 272 (1888).

[5] 3 Int. Com. Rep. 460, 4 I. C. C. Rep. 535 (1891).

"Ordinarily there is no better criterion for reasonable charges than that which is in proportion to the service rendered; and if the cost and expense of the carrier was the only test of a reasonable charge the claim might well be made that all coals should be classed together as one freight and be subject to the same transportation charges.

"Carriers in making separate classifications, or rates for different coals, take into consideration, not only the expense of transportation, but the value of the freight and worth of the transportation to the shipper; the exceptional qualities which fit the more valuable anthracite for domestic and special uses and cause its large consumption in less distant markets; the shorter distance from the mines to the principal markets rendering the transportation proportionately more expensive, and the necessity for so apportioning the transportation charges between the anthracite of different sizes and values that the more valuable may bear the greater charge."

§ 593. Market value rather than intrinsic value.

It is not the cost to the manufacturer or the intrinsic value of the product that is considered in determining classification, but the value in the market; both because that would furnish the measure of the carrier's liability in case of loss, and because that is the only value which the carrier can know. This doctrine was applied to justify the higher classification of patent medicines as compared with ordinary bottled liquors. In the case of Warner v. New York Central & Hudson River Railroad [6] the complainant insisted that the classification of his remedies should be the same as that of ale, beer and mineral waters. This contention he based on two general grounds. One was that the mode of packing, the convenience in handling and the risks in transportation were substantially the same. The other was that the intrinsic value of the remedies was no greater than the intrinsic value of the other articles with which he claimed they should

[6] 3 Int. Com. Rep. 74, 4 I. C. C. Rep. 32 (1890).

be classified. He claimed that while the market value of the remedies was about four times greater than that of mineral water and the other articles, about three-fourths of the market value was the result of skill in advertising the remedies.

Mr. Commissioner Schoonmaker said: "Whatever the fact may be in the case of these medicines, it can hardly be expected of carriers that they should disregard the market value of the articles they carry, and what their manufacturers give the public to understand concerning them, and enter upon the difficult and expensive task of an analysis of freight to ascertain its intrinsic value as distinguished from its market value. If a rule of this kind were possible and should be generally applied, it would result in most injurious consequences to some of the most important articles of commerce of large actual value, but on account of their abundance, of low market value, such as grain and other food products, coal and lumber.

"The value of an article to a manufacturer is the price it commands, and it seems only reasonable that carriers should take into account the market value, a thing generally known and easily ascertained, as one of the considerations in arranging their classifications and fixing the rates that a commodity should bear. It is not seen how the relations that any specific commodity should bear to other commodities for classification purposes can be arrived at in any other practicable way. The wide difference in the market value of ale, beer and mineral water on the one hand, and the remedies of the complainant on the other hand, is, so far as can be seen under the evidence in this case, a reasonable ground for a difference in the classification of these respective articles."

§ 594. Differing value of same kind of freight.

As has been seen,[7] classification is not to be made too minute; and in general a difference of value between articles of the

[7] *Ante*, § 557.

same kind does not lead to a different classification based on value. Thus, flour or cotton or silver ore would have the same classification, without regard to quality and value. To this there are some exceptions; thus in the official classification a difference is, or was, made in the classification of electrotype plates, engravings, paintings and pictures, statuary, bronze or metal, and stereotype plates, where the limitation of value is based upon the net invoice and required to be so expressed in the shipping receipts by shippers. The classification also contains rules restricting to specified sums the valuation of live stock; marble or granite; ore:—antimony, calamine, copper, lead, silver, tin, or mica, such valuation to be stated by the shipper in the shipping order or receipt; and the class rate is given only where the value is so restricted. But in general it would not be permissible to make a difference between articles of the same kind merely because of value.

On this ground the Interstate Commerce Commission adhered to its former ruling that window shades should be placed in the same class with shade cloths, in spite of a contrary opinion in the Circuit Court of the United States, where Mr. Justice Wallace had said: "The order of the Interstate Commerce Commission which the court is now asked to enforce prohibits the railway carriers, the parties respondent, from charging any greater compensation for the transportation of window shades of any description — whether the cheap article, worth $3.00 per dozen, or the hand-decorated article, worth $10.00 per pair — than the third-class rate, the rate charged for the transportation of the materials used in making window shades. Such an order, in my judgment, ignores the element of the value of the service in fixing the reasonable compensation of the carrier, and denies him any remuneration for additional risk." But even in the face of this opinion the Interstate Commerce Commission still held its ground, saying: "The elements of bulk, weight, value, and character are main considerations in determining approximately what freight articles are so analogous

as to entitle them to the same classification. Other considerations may also enter into the question, but in this case, where the comparisons made on these bases indicate the propriety of a like class for hollands or shade cloth and window shades made therefrom (the great mass of shades at least), such other matters must be deemed to have only minor weight and importance."[8]

§ 595. Low value of goods as reducing classification.

Value has been considered heretofore as leading to a higher classification, by increasing the risk; but if the value of the goods is very low, this fact will tend to reduce the classification, because the value of transportation to the shipper will thereby be reduced. Thus in the shipment of low-grade lumber from southern points the fact that the value of the lumber at the mills was less than the freight was pointed out as a reason for reducing the classification and rate.[9]

§ 596. Value of the commodity not of the greatest importance.

In a recent opinion of the Commission [10] the bearing of the value of hay upon its classification was considered. It appeared to be the view of all parties that the value of the goods carried was important chiefly on the question of the danger of loss and the amount of the insurance risk. The Commission said: "The element of risk is not regarded by the carriers themselves as having much bearing on this controversy. Few claims for loss or damage of hay in transit are made upon the carriers. The testimony on their behalf was to the effect that in estimat-

[8] Compare Page v. Delaware, L. & W. R. R., 6 I. C. C. Rep. 548 (1896), with Interstate Com. Com. v. Delaware, L. & W. R. R., 64 Fed. 723 (1894).

[9] Tift v. Southern Ry., 10 I. C. C. Rep. 548 (1903).

[10] National Hay Assoc. v. Lake Shore & M. S. Ry., 9 I. C. C. Rep. 264 (1902). See Interstate Com. Com. v. Lake Shore & M. S. Ry., 134 Fed. 942 (1905).

ing the proper rating of a commodity the higher value of that commodity as compared with the value of other articles, particularly in the lower classes, would not be deemed to constitute such additional risk in transportation as to warrant a higher classification solely upon that account. In other words, greater risk because of much higher value is one of the matters to be considered in fixing a classification, but it is not considered controlling upon articles not specially liable to damage in transportation. The value of articles most strongly affects determination of rates for their transportation in that the value of the service to the shipper is generally greater upon the more costly products. Some illustration of this is shown by the classification of cotton piece goods in the Official Classification as 15 per cent. less than second class, while dry goods generally are in first class, and numerous other examples might be given. The value of hay and straw is low as compared with that of other coarse food products, and is greatly below the value of flour and the finer grades of grain products. It is also greatly less per carload than that of most, if not all, other articles in the fifth class."

TOPIC F—CAR LOAD RATES.

§ 597. Different classification and rating between car load and less than car load lots.

A fundamental principle in all classification is that one rate shall be given when the goods are carried in carload lots, and a much higher rate when they are carried in less than carloads. This difference is legally proper.[1] If a carload can be handled as a unit, in loading, transporting, and delivering, the cost to the carrier is obviously much less; and furthermore there is no waste through hauling a partly empty car, as must necessarily happen in many cases where less than carload lots are shipped.

[1] Harvard Co. v. Pennsylvania Ry., 3 Int. Com. Rep. 257, 4 I. C. C. Rep. 212 (1890). See, generally, Chapter XXIII.

The difference between carload and less than carload rates must be a reasonable one. It must not be so wide as to be destructive to competition between large and small dealers, especially upon articles of general and necessary use, and which, under existing conditions of trade, furnish a large volume of business to carriers.[2]

§ 598. Difference in classification not essential.

It is not necessary in the ordinary case that this difference should be made. If in any case the carrier chooses to carry goods in less than carload lots at the same rate as carload lots, the shippers of carloads cannot complain.[3] As Mr. Commissioner McDill said in Brownell v. Columbus & Cincinnati Midland Railway:[4] "That less than carload lots of eggs can be shipped at the carload rate is, in our judgment, a concession to the less than carload shipper which, under its already low classification and the other circumstances surrounding the egg traffic, does not work unjust discrimination to the shipper of eggs in carloads."

§ 599. Minimum car loads.

The carload rate necessarily involves some standard for determining what shall constitute a carload; and this is usually established by fixing a minimum weight of the commodity as a carload. This must of course be fixed reasonably, and must not exceed the weight that can properly be loaded in the car provided. "A carrier in defining a carload and fixing the rate should furnish a car adapted to carry properly the quantity designated, and not put the shipper to any expense to fit up

[2] Thurber v. New York C. & H. R. R. R., 2 Int. Com. Rep. 742, 3 I. C. C. Rep. 473 (1890).

[3] R. R. v. Weld, 96 Tex. 394, 73 S. W. 529.

[4] 4 Int. Com. Rep. 285, 5 I. C. C. Rep. 638 (1893).

the car. This expense would seem to be in excess of the tariff rate and unlawful." [5]

"It would manifestly be unjust, under any rule as to minimum loads or otherwise, to charge for weight not carried in a car which the carrier has furnished and in which on account of its size and the nature and bulk of the freight the required minimum cannot be loaded. There may of course be some exceptions to such a rule in cases where the freight is extremely light in weight in comparison with its bulk, and of such character as to forbid close packing, but it has proper application to general freight which is usually capable of being shipped in bulk or in bales or boxes." [6]

§ 600. **Minimum car load regulations.**

Like other regulations minimum arrangements should be as uniform as possible. If they are unduly numerous, the chief advantages are lost. This was well brought out before the Interstate Commerce Commission [7] in one proceeding where shippers complained of numerous minimum carload weights being enforced to their prejudice and disadvantage. It appeared that the railroad in question had four minimum carload weights for corn, as follows: (a) The capacity of the car on shipments to Indianapolis; (b) 4,000 pounds less than car capacity on shipments to Cincinnati and other points; (c) the capacity of the car ordered when such order cannot be complied with, but this only on application to the superintendent, thus entailing more or less delay and at times loss to shippers; (d) a general minimum of 28,000 pounds. The Commission said: "Other roads in the same section of country do not enforce a sliding scale of minimum weights depending upon capacity of cars

[5] Schoonmaker, Com. in Rice v. Western N. Y. & P. R. R., 2 Int. Com. Rep. 298, 2 I. C. C. Rep. 389 (1888).

[6] Clements, Com. in National Hay Assoc. v. Lake Shore & M. S. Ry., 9 I. C. C. Rep. 264, 305 (1902).

[7] Suffern, Hunt & Co. v. Indiana, D. & W. Ry., 7 I. C. C. Rep. 255 (1897).

furnished by themselves. One of them, as shown in the findings, disregards a like rule, which it claims to have in effect, whenever it thinks the shipper is entitled to relief. Rules for minimum weights which cannot be invariably enforced, or which, if so enforced, are plainly prejudicial to any class of shippers, are not to be regarded as lawful."

§ 601. Mixed car loads.

Mixed carloads of articles of the same class and the same general nature should receive carload rates. So a mixed carload of celery and cauliflower, vegetables entitled to the same classification, should receive carload rates.[8] Any classification which interferes with the reasonable freedom of the shipper in this respect is improper.

" Examination of the tariff providing for mixed carloads of green fruit shows that bananas and pineapples may go as a mixed carload, and that lemons and bananas mixed take the carload rate; and that pineapples may be mixed in a carload with almost any other kind of fruit therein specified except lemons and oranges. As bananas and pineapples may be mixed and lemons and bananas may be mixed, it is difficult to see why the complainant is not correct in contending that lemons, bananas and pinapples may be mixed in one carload and carried at the carload rate, and yet technically lemons and pineapples cannot be forwarded together in a carload and receive the benefit of the carload charge under the present classification." [9]

§ 602. Car loaded by several shippers.

It has been said that a difference in rate for a solid carload of one kind of freight from one consignor to one consignee, and

[8] Tecumseh Celery Co. v. Cincinnati, J. & M. Ry., 4 Int. Com. Rep. 318, 5 I. C. C. Rep. 663 (1893).

[9] Clements, Com. in Roth v. Texas & P. Ry., 9 I. C. C. Rep. 602, 605 (1904).

a carload quantity from the same point of shipment to the same destination consisting of like freight or freight of like character from more than one consignor to one consignee, or from one consignor to more than one consignee, is not justified by the difference in cost of handling.[10]

Much of the saving effected by carload transportation for a single shipper to a single consignee would equally be effected by this sort of shipment, but it is certainly somewhat more expensive to the carrier, since it involves or may involve additional trouble in connection with the loading or delivery, as the case may be. It would probably not be a case where the carrier could be forced to grant carload rates.[11]

§ 603. Train loads.

While lower carload rates are based on a real saving in cost of transportation, the same thing cannot be said, at least to the same extent, of train-load rates; and such rates are not generally permissible.[12] But in England it is held that under certain circumstances lower rates may be given for shipments in train loads.[13]

TOPIC G—DIFFERENCE IN RATE BETWEEN CLASSES.

§ 604. General principles governing differences between classes.

It remains to point out formally what has been assumed throughout this chapter that there are great differences between the rates payable for transportation for the same distances upon goods in different classes. There is no fixed percentage

[10] Thurber v. New York C. & H. R. R. R., 2 Int. Com. Rep. 742, 3 I. C. C. 473 (1890).

[11] See § 270, *supra*, and cases cited, especially Buckeye Buggy Co. v. Cleveland, C., C. & St. L. Ry., 9 I. C. C. Rep. 620 (1903).

[12] Paine v. Lehigh Valley R. R., 7 Int. Com. R. 218 (1897).

[13] Nicholson v. Gt. Western Ry., 4 C. B. N. S. 366.

for differentiation even of the six classes usually established; still less is there any definite rule for the differences to be made between commodities with extra class rating. But it is matter of common knowledge that there are great differences between rates payable by the different classes, the highest class usually paying for the same transportation many times what is paid by the lowest class. All that can be said in general is that the principles as to rate making apply here as elsewhere and that the burden must be thrown upon the various classes without outrageous disproportion. The principles governing this matter were summarized by the Massachusetts Railroad Commission thus: "Where the Board is asked to recommend to a corporation a reduction of its freight tariff in respect to a particular commodity, it is necessary for the petitioner to prove at least one of three propositions: (a) That the charge by the corporation respondent in regard to the commodity in question is excessive as compared with the charge made by other companies; or (b) That the charge is excessive as compared with the charges of the same corporation for other commodities of like bulk and weight; or (c) That exceptional reasons exist, which would allow the corporation to transport the commodity in question with a fair profit at rate unusually low.[1]

§ 605. Low grade commodities may be carried at rates relatively low.

To go to one extreme, low grade commodities may be carried at rates relatively very low indeed. Provided that the rate is remunerative, the other classes cannot complain that the rate is disproportionately low, since unless such a rate were made the traffic would not be got and the higher classes would lose the benefit. To quote the Interstate Commerce Commission: "While some of the relatively low rates on low class commodities, including iron and steel, are lower because of competition

1 Freetown v. New Bedford & T. R. R., 1871, Mass. Ry. Com. 115.

by water than they would otherwise be, the general comparatively low rating applied to them is largely due to the character of such commodities, the use to which they are put, the demand for them in large quantities throughout the country, their susceptibility of movement at less cost and risk to the carrier than high class and more valuable freight, and other like conditions. It is to the interest of the carriers as well as the public, that their rates be low enough, if not below a remunerative point, to permit the general movement and distribution of these commodities in general demand in large quantities for construction, building, manufacturing, and other purposes. Reasonable freedom of such movement and distribution stimulates the growth and development of the country and thereby promotes all interests. The general prevalence of such lower rates on this character of freight is due to the carriers' usual policy of making rates that will fairly permit the traffic to move, if of such value that it will bear reasonable charges. Rates on steel rails and other low grade freights of the character stated, yielding per ton per mile the average received on all freight, would be unjust. The value of the goods, the cost of the service, the degree of risk to the carrier, among other considerations, have important bearing upon the relation of rates on different kinds of traffic as well as the reasonableness of the rate on a specific article." [2]

§ 606. High grade commodities should not be overcharged relatively.

On the other hand, just because high grade commodities will stand a rate relatively very much higher, it is not justifiable to charge them outrageously disproportionate rates. This was set forth in a most striking manner in one report of the Interstate Commerce Commission, where it said: "Fur hats, for example, move at first class rates, and six dozen of these ready for ship-

[2] Colorado Fuel & Iron Co. v. So. Pacific Ry., 6 I. C. C. Rep. 489 (1895).

ment weigh, approximately, 100 pounds. The cost of transporting that 100 pounds from New York, where these hats are manufactured, to Chicago, is 75 cents, or about 1 cent per hat. Evidently the number of hats worn in the city of Chicago would not be appreciably diminished if this freight rate were to be doubled. If such hats were manufactured both at New York and at Baltimore, and the rate from New York were to be increased, while that from Baltimore remained the same, this might shut up the New York factory; or, if the rate were too high, the establishment of a factory in Chicago might be induced; although this would not be true in case of hats, since the raw material, which moves at the same rate, originates on the Atlantic Seaboard. Probably the first class rate throughout all Official Classification territory could be advanced 50 per cent. without appreciably reducing the volume of traffic." [3]

§ 607. Differences between the classes should not be disproportionate.

The principle to be deduced from the cases which have just been discussed is that the differences in rates between the classes in a classification should not be disproportionate. Thus in one case before the Interstate Commerce Commission,[4] in comparing commodities, it was said: "Now, the first class rate from Chicago to New York is 75 cents, and the business which moves upon that rate is entirely less than a carload. If it costs these lines four times as much to handle that business as it does to handle grain in carloads, it must follow that this first class rate is not materially better than the grain rates under consideration."

In an early Massachusetts case,[5] where a question as to the difference in rating between bricks and ice was made, the court

[3] Re Advances in Freight Rates, 9 I. C. C. Rep. 382 (1902).
[4] Re Advances in Freight Rates, 9 I. C. C. Rep. 382 (1902).
[5] Fitchburg Ry. v. Gage, 12 Gray (Mass.), 393, B. & W. 354 (1859).

said: "They (shippers) contended and offered to prove at the hearing before the auditor, that while the plaintiffs were transporting the ice they were at the same time hauling over the same portion of their road various quantities of bricks for other parties; that ice and bricks were of the same class of freight, and that ice was as low a class of freight as bricks in regard to the risk and hazard of transportation; and that while they charged the defendants fifty cents per ton for the transportation of ice, they charged other parties only twenty cents per ton for a like service in reference to bricks. The defendants (carriers) contended that they were entitled to maintain their claim upon two grounds: First, under the provisions in the plaintiffs' act of incorporation; and, secondly, upon the general principle that as common carriers they were bound and required to transport every species of freight of the same class for any and all parties at the same rate of compensation; and that they had therefore no right to charge any greater sum for the transportation of ice than that for which they had actually carried bricks for other parties. Neither of the claims was sustained by the auditor, and he accordingly rejected the evidence offered in support of them. In both particulars we think his ruling was correct."

§ 608. Principles upon which rates for different commodities should be made.

In one investigation the Interstate Commerce Commission went into the relative rates upon different commodities to determine whether they were justifiable. Comparing some, they said: "Dressed beef loads about 22,000 pounds to the car. Refrigeration is necessary, and this requires a car of peculiar construction and of unusual weight—about 36,000 pounds. The ice and salt weigh, approximately, 5,000 pounds, making in the aggregate for the entire load, 63,000 pounds, of which but 22,000 pounds are paying freight. At 45 cents a hundred this would amount to $99 per car. Packing-house products, or pro-

visions, load somewhat heavier than dressed beef, on the average about 30,000 pounds. This, upon a basis of 30 cents, would yield a revenue of $90 per car. The average loading of grain cars upon standard lines at the present time is probably 65,000 pounds. It was said by all witnesses inquired of that grain is now loaded to the full capacity of the car. Within the last three years railroads have added largely to their equipment of freight cars, and the addition has been almost entirely in cars of large capacity. The traffic manager of the Michigan Central testified that the cars upon his system are from 60,000 to 80,000 pounds capacity. A grain load of 65,000 pounds would yield $113.75, as against $99 for dressed meats and $90 for provisions. The total weight of the grain and car would be greater than either the dressed beef or provisions, but testimony in previous cases showed that in the operation of these railways the tendency is to regard the loaded car as the unit; a train-load, consisting of a certain number of cars without much reference to the loading of those cars." [6]

§ 609. **Reasonableness tested by comparison.**

Where the same rate was given to the class containing finished cheap bedroom sets of furniture and to another class containing unfinished sets of the same sort, which were of less value and could be packed in smaller bulk, it was held that the failure to make a distinction in rates was unfair; and upon consideration the rate on the unfinished class was fixed at eighty-five per cent. of that on the finished furniture.[7]

Upon similar principles a classification which puts into different groups "steam coal," which is coal that can be used only for manufacturing purposes, and soft or lump coal, which is of higher value and is used for domestic purposes, is proper.[8]

[6] See Re Advances in Freight Rates, 9 I. C. C. Rep. 382 (1902.)

[7] Potter Mfg. Co. v. Chicago & G. T. R. R., 4 Int. Com. Com. 223, 5 I. C. C. Rep. 514 (1892).

[8] McGrew v. Missouri Pac. Ry., 8 I. C. C. Rep. 630, 641 (1894).

§ 610. Differences between similar commodities ought to be very slight.

In one proceeding[9] before the Interstate Commerce Commission the complainant claimed that beans and tomatoes should go in the same class, and that the defendant railway, by putting beans in the second class at a rate of 70 cents per hundred, while tomatoes went third class at a rate of 44 cents per hundred, had discriminated against the complainant as a shipper of beans.

The Commission said: "An exact classification is impossible. Unless the number of classes is infinitely increased there must always be articles in respect to which it will be very difficult to determine into which of two classes they should fall. If the elements which fix the class are substantially the same in case of two articles, then those articles should, as a matter of law, be classified alike, and to put one in one class and another in another class would be a discrimination and a violation of the act, no matter what the purpose of doing it might be. It appears here that beans and tomatoes are both shipped in peck boxes and that the defendant's agent at Verona was accustomed to receive and bill the same number of boxes for one hundred pounds whether of beans or of tomatoes, so that the complainant, as a shipper of beans, was obliged to pay 70 cents for transporting eight boxes of his commodity to East St. Louis while the shipper of tomatoes was only obliged to pay 44 cents for transporting eight boxes of his commodity, the nominal weight being the same and the value about the same. If this were all there was of the testimony we might hold that beans ought to be rated third class with tomatoes, but the defendant's testimony tends to show that beans are more perishable, and it appears, in part from the complainant's testimony as well as that of the defendant, that tomatoes are in fact heavier than beans.[10]

[9] Rea v. Mobile & O. Ry., 7 I. C. C. Rep. 43 (1896).

[10] See, also, Harvard Co. v. Pennsylvania Co., 3 Int. Com. Rep. 257, 4 I. C. C. Rep. 212 (1890).

CHAPTER XIX.

LENGTH OF TRANSPORTATION.

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§ 621. General standard of comparison the ton mile.

If all conditions were equal, the rate of carriage would naturally vary according to the distance carried, and would be measured by a charge of so much per ton for each mile; or, as it is generally expressed, by a ton-mile rate. This is obviously a fair method of determining a rate where the conditions are identical; and as a theoretical doctrine it is well accepted that in the absence of other influences distance is a controlling element in determining a rate.[1]

As a practical matter, however, other influences are never absent; some factor exists in every case to modify the comparison and to prevent the application of the ton-mile rate. The establishment of a ton-mile rate as a standard does indeed bring rates down to the narrowest point of scrutiny, and for that purpose is valuable; but it excludes consideration of other circumstances and conditions which enter into the making of rates, no matter how compulsory or imperious they may be, and it cannot, therefore, be accepted as controlling in determining the reasonableness of rates.[2]

[1] Eau Claire Board of Trade v. Chicago, M. & S. P. R. R., 4 Int. Com. Rep. 65, 5 I. C. C. Rep. 265, 290 (1892); Hill v. Nashville, C. & S. L. R. R., 6 I. C. C. Rep. 343, 358 (1896); Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 7 I. C. C. Rep. 180 (1897). See, generally, Chapter XXV.

[2] Gustin v. Atchison, T. & S. F. R. R., 8 I. C. C. Rep. 277 (1899); Board of Railroad Comrs. v. Atchison, T. & S. F. R. R., 8 I. C. C. Rep. 304 (1899); Business Men's Assoc. v. Chicago, S. P., M. & I. R. R., 2 Int. Com. Rep. 41, 2 I. C. C. Rep. 52, 67 (1890); Manufacturers & J. Union v. Minneapolis & S. L. R. R., 3 Int. Com. Rep. 115, 4 I. C. C. Rep. 79 (1890); Hilton Lumber Co. v. Wilmington & W. R. R., 9 I. C. C. Rep. 17 (1901).

TOPIC A—FACTORS MODIFYING THE TON-MILE RATE.

§ 622. Mileage rate tends to decrease inversely with the distance.

It is a familiar rule in the transportation of freight by railroads and has become axiomatic that while the aggregate charge is continually increasing the further the freight is carried, yet the rate per ton per mile is constantly growing less all the time. In consequence of the existence of this rule the increase of the aggregate charge continues to be less in proportion every hundred miles after the first, arising out of the character and nature of the service performed and the cost of service; and thus it is that staple commodities and merchandise are enabled to bear the charges of transportation from and to the most distant portions of the country.[3] The reason for this rule is that the cost of railway transportation is made up of the expense of the two terminals and the intermediate haul, and the terminal expenses are the same whether the haul be long or short. A few miles, or even a considerable number of miles, of additional haul may in some instances of long distance transportation be practically of very little importance, and the aggregate rate therefore may be very little affected by the additional mileage.[4] As a result of this rule of diminishing mileage, local rates on one road cannot reasonably be compared with through rates on other roads in the same region.[5]

[3] New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. R., 2 Int. Com. Rep. 289, 2 I. C. C. Rep. 375 (1888); Farrar v. East Tenn. V. & G. R. R., 1 Int. Com. Rep. 76, 1 I. C. C. 480 (1888); Board of Trade of Troy v. Alabama Midland Ry., 6 I. C. C. Rep. 1 (1893).

[4] McMorran v. Grand Trunk Ry., 2 Int. Com. Rep. 604, 607, 3 I. C. C. Rep. 252 (1889); Hilton Lumber Co. v. Wilmington & M. R. R., 9 I. C. C. Rep. 17 (1901).

[5] Imperial Coal Co. v. Pittsburgh & L. E. R. R., 2 Int. Com. Rep. 436, 2 I. C. C. Rep. 618 (1889).

§ 623. Equal mileage rates impractical.

The effects of an absolutely equal mileage rate, which must prevent its adoption as a practical system of charges, were thus stated by a committee of the British Parliament.[6] "(a) It would prevent railway companies from lowering their fares and rates so as to compete with traffic by sea, by canal, or by a shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition and the company of a legitimate source of profit. (b) It would prevent railway companies from making perfectly fair arrangements for carrying at a lower rate than usual goods brought in large and constant quantities, or for carrying for long distances at a lower rate than for short distances. (c) It would compel a company to carry for the same rate over a line which has been very expensive in construction, or which, from gradients or otherwise, is very expensive in working, at the same rate at which it carries over less expensive lines. In short, to impose equal mileage on the companies would be to deprive the public of the benefit of much of the competition which now exists or has existed, to raise the charges on the public in many cases where the companies now find it to their interest to lower them, and to perpetuate monopolies in carriage, trade, and manufacture in favor of those routes and places which are nearest and least expensive, where the varying charges of the company now create competition. And it will be found that the supporters of equal mileage, when pressed, often really mean, not that the rates they themselves pay are too high, but that the rates which others pay are too low."

§ 624. Rates are in rough proportion to distance normally.

The Interstate Commerce Commission early announced the principles which it held fundamental in dealing with this ques-

[6] Stated in a note to Ransome v. Eastern Counties Ry., 1 Eng. Ry. & Can. Traf. Cas. 63 (1857).

tion. Thus in one opinion[7] it was said in substance: "The doctrine that transportation charges should be proportioned to the distances between different points, where those distances are greatly dissimilar, has never been advocated by the railroads or recommended by the Commission. While distance is an ever-present element in the problem of rates and not infrequently a controlling consideration, the general practice of rate making is opposed to the principle of exact proportion, and there is no opportunity for its application under present conditions. Where all the distances brought into comparison are considerable, and the differences between them relatively small, there should be substantial similarity in the respective rates unless other modifying circumstances justify disparity.

"That rates should be fixed in inverse proportion to the natural advantages of competing towns with the view of equalizing 'commercial conditions,' as they are sometimes described, is a proposition unsupported by law and quite at variance with every consideration of justice. Each community is entitled to the benefits arising from location and natural conditions, and the exaction of charges unreasonable in themselves or relatively unjust, by which those benefits are neutralized or impaired, contravenes alike the provisions and the policy of the statute."

§ 625. Different cost of service; heavy grades.

A difference in the ton-mile rate may be justified by varying cost of service on different parts of the line. Thus a higher ton-mile rate is justified on a haul which includes heavy grades.[8]

[7] Eau Claire Board of Trade v. C. M. & S. P. Ry., 4 Int. Com. Rep. 65, 5 I. C. C. Rep. 264 (1892).

[8] Rice v. Western N. Y. & P. R. R., 2 Int. Com. Rep. 319 (1888); Brockway v. Ulster & D. R. R., 8 I. C. C. Rep. 21 (1898); Bellsdyke Coal Co. v. North British Ry., 2 Ry. & Can. Tr. Cas. 105 (1875); Nitshill Coal Co. v. Caledonia Ry., 2 Ry. & Can. Tr. Cas. 39 (1874).

The uniform mileage rate may also be modified by the proximity of fuel to one portion of the road.[9]

In New Orleans Live Stock Exchange v. Texas & Pacific Railway,[10] a rate on cattle in carload lots was attacked as too high. The defendant's road had a heavy grade on the western portion, but a very easy grade on the eastern portion; only 30 cars could be handled on the western portion, while on the eastern portion 60 cars could be handled. The defendant claimed therefore that the most economical method of carrying would be to run only half as many freight trains over the eastern portion; but as cattle trains must go directly through, this could not be done in the case of cattle.. The Commission said, however: "The defendant seems to claim that it ought to be allowed to charge a higher rate because if it sends this live stock through in proper time it cannot consolidate its trains at Boyce; but it is a novel idea that the rate should be advanced because the cost of operation over a part of the line is decreased, and it certainly costs less per mile to haul the same train from Boyce to New Orleans than from Fort Worth to Marshall."

§ 626. Competition modifying distance rates.

It is well settled that under the Interstate Commerce Act competition may be considered in fixing the particular rate,[11] and if it may be considered under the Act, *a fortiori* it may influence the rate at common law.[12] And indeed competition be-

[9] New Orleans Cotton Exch. v. Illinois Cent. R. R., 2 Int. Com. Rep. 777, 3 I. C. C. Rep. 534 (1890).

[10] 10 I. C. C. Rep. 327 (1904).

[11] Texas & P. Ry. v. Interstate Commerce Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666 (1896); East Tennessee V. & G. Ry. v. Interstate Commerce Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516 (1901); Interstate Commerce Com. v. Louisville & N. R. R., 73 Fed. 410 (1896); Rice v. Western N. Y. & Pa. R. R., 2 Int. Com. Rep. 389 (1888); Gardner & Southern Ry., 10 I. C. C. Rep. 342 (1904); Phipps v. London & N. W. Ry. [1892], 2 Q. B. 229.

[12] Under the Kentucky constitution, however, competition will not jus-

tween railways is one of the most important factors in determining the rate between points which are connected by other railways or which have access to water routes. From an economic point of view the railroad is justified in making any reduction to competitive points that is necessary to get business, provided that it does not place its rates below remuneration for the costs of handling the competitive traffic. But while a through rate to a competitive point is commonly found to be relatively less than the local rates, the difference which the law will permit must not be unreasonable. This general problem is discussed elsewhere. It is enough, therefore, to give at this place one of the important limitations upon making a through rate less than a local rate. An intermediate local rate should never exceed the through rate to the terminus of the line plus the local rate back to the intermediate point.[13]

§ 627. **Comparison of through rates and local rates.**

It is often hard for the courts to justify a startling disproportion between through and local rates. Thus in one case the court expressed much surprise at such differences, saying: "The tariff rate for coal per ton from Duluth to the first station south of Minneapolis (Hopkins), about 9 miles, and on defendant's line of road, was $1.75. To Norwood, a trifle over 40 miles from Minneapolis, it was $2.50. It was the same to the stations southerly, 21 in number; the one most southerly being Boyd, 152 miles distant from Minneapolis, or about 112 miles beyond Norwood. That is, the rate agreed upon was the same per ton in carload lots, whether it was transported to a station 40 miles south of Minneapolis, or to another station 152 miles distant. And of

tify a difference in rates. Louisville & N. R. R. v. Com., 20 Ky. L. Rep. 1380, 43 L. R. A. 541, 46 S. W. 707, 20 Ky. L. Rep. 1102, 47 S. W. 210, 20 Ky. L. Rep. 1394, 43 L. R. A. 549, 47 S. W. 598 (1898); Louisville & N. R. R. v. Com., 21 Ky. L. Rep. 232, 51 S. W. 164 (1899).

[13] Martin v. Southern Pac. Co., 2 Int. Com. Rep. 1, 2 I. C. C. Rep. 1 (1888).

this agreed rate it was stipulated by the railway companies that the carrier from Duluth to Minneapolis should receive $1 per ton, distance 162 miles. We refer to these figures for the purpose of calling attention to what is evidently a fact, that the defendant was either carrying coal to Boyd at a loss, or was collecting too much tariff per ton on the same article transported to Norwood." [14]

§ 628. Difference in charge for carriage in opposite directions.

There is no reason for requiring the same charge for carriage between the same points in opposite directions.[15] Various factors which properly enter into the rate may be different in the two cases. In a case [16] where a higher rate was charged for the eastward than for the westward carriage, Mr. Commissioner Clements said: "The claim is, in substance that the rate of $3.50 eastward is unreasonable in view of the fact that the rate over the same line and between the same points westward is only $2.63. This fact alone is relied upon to support the charge. The two rates have no necessary connection or relation, and the fact that a rate over a road or line in one direction is materially higher than the rate on the same class of traffic over the same road or line and between the same points in the opposite direction does not, as in case of hauls over the same line in the same direction, establish *prima facie* the unreasonableness of the higher rate. This would appear to be especially true where the hauls are of as great length as those now under consideration. It is moreover in evidence, as remarked above, that the 'westbound movement of the traffic termed "emigrants' moveables"

[14] State v. Minneapolis & St. L. Ry., 80 Minn. 191, 83 N. W. 60 (1900). See, also, Interstate Com. Com. v. Western & A. R. R., 88 Fed. 186, 93 Fed. 83, 35 C. C. A. 217 (1900).

[15] Macloon v. Boston & M. R. R., 9 I. C. C. Rep. 642 (1903).

[16] Duncan v. Atchison, T. & S. F. R. R., 6 Int. Com. Rep. 85, 102, 4 I. C. C. 385 (1893).

is double the east-bound movement,' and the goods shipped west as 'emigrants' moveables' are 'materially lower in value' than those shipped east. It may be conceded that the much greater volume of the traffic moved west than east is to some extent attributable to the lower rate west, but the tide of emigration is naturally from a comparatively old and thickly populated country like the east to a new and sparsely settled country like the west. No evidence as to the unreasonableness of this rate in itself has been offered."

In this case it will be noticed that the reason given for justifying the greater rate eastward was the fact that the volume of traffic was less. It is characteristic of the inexact character of rate-making that this fact might also justify a lower rate, if the railroad chose to make it.

§ 629. Low back freights justifiable.

Thus, where in the direction of lighter traffic a railroad is carrying many empty cars, it will be justified in lowering the rate in order to fill the cars. "When the preponderance of freight is so largely in one direction that the supply of empty cars exceeds the demand for return loads at full rates, it is not unlawful to encourage business by affording transportation on less profitable terms." [17] Of course this making of low back freights is subject to the limitation that the rate must not be so low as not to recoup the railroad for the additional expenses in hauling back loaded cars which must receive due protection during transit.

§ 630. Creation of a market by preferential rates.

Only to a certain extent the carrier may be allowed to favor a new town, and thereby create a new market and stimulate com-

[17] James v. East Tennessee V. & G. R. R., 2 Int. Com. Rep. 609, 3 I. C. C. Rep. 225 (1889); New Orleans Cotton Exch. v. Illinois Cent. R. R., 2 Int. Com. Rep. 777, 3 I. C. C. Rep. 534 (1890); Macloon v. Boston & M. R. R., 9 I. C. C. Rep. 642 (1902); Hewins v. New York, N. H. & H. R. R., 10 I. C. C. Rep. 221 (1904).

petition. "The Louisville & Nashville insists that the nearby market of Pensacola is entitled to all of this great advantage. It claims that the lower rates to Pensacola were necessary to create a market there for these stores, and, further, that the carriage to Pensacola is only part of its haul on the great majority of the shipments, while on shipments to Savannah it can only have the short haul to River Junction, where it must turn the traffic over to one of its connecting roads. Whatever difference in rates may have seemed necessary at the outset to create a demand in the Pensacola market, it is apparent now, after several years' trial, that the rates to Savannah as compared with the Pensacola rates give an unwarranted advantage to Pensacola. In endeavoring to build up a nearby market at Pensacola, and so furnish these products with a market in addition to the one existing at Savannah, the Louisville & Nashville was acting in the interest of producers of and dealers in naval stores on its Pensacola & Atlantic division. It went beyond this, however, and so controlled the adjustment of rates to the two markets as to give Pensacola a practical monopoly of the trade. A carrier cannot lawfully establish and maintain an adjustment of rates which in practice prevents shippers on its line from availing themselves of a principal market which they have long been using, and confers a substantial monopoly upon a new market in which, for reasons of its own, it has greater interest. That is what has been done in this case." [18]

§ 631. Equalizing manufactures in different localities.

To a certain extent also, but subject to many limitations discussed elsewhere, a railroad management may equalize the access of manufacturers in different nearby localities to their sources of supply so that all may compete upon equal terms in common markets. That this tends to promote distribution of manufacturing industries, which has its advantages, may be

[18] Savannah Bureau of Freight & Transportation v. Louisville & N. R. R., 8 I. C. C. Rep. 377, 404 (1900), affirmed in 118 Fed. 613 (1902).

admitted, but the extent to which the common carrier may be permitted to play the part of a beneficent despot is a question. Yet the courts do not insist too much upon a mileage basis where the advantages of equalization are plain and the results are more or less fair to all concerned. In one such case it appeared that the Allegheny Valley Railroad crosses the Pennsylvania Railroad at Allegheny Junction. To compete more successfully with the river transportation, the Allegheny Valley Railroad carried crude oil to the refineries at Pittsburgh, and the manufactured product back to Allegheny Junction, at a uniform rate, thus giving to the refiner at Pittsburgh as favorable terms as if located at Allegheny Junction, and thereby securing a uniform rate on oil from the oil regions to the seaboard. It was held that to deny the right to make such an arrangement would be an unwarranted interference with the management of the business of the railroad, and deprive the public of the benefit of the competition to which it is justly entitled.[19]

§ 632. **Passenger fares generally on a mileage basis.**

No such principles generally prevail in establishing passenger fares—these are usually made upon a mileage basis, and do not decrease inversely with the distance as in freight rates. This was brought out in a remarkable case before the Interstate Commerce Commission,[20] where the through interstate rate was found to be more than the combined local intrastate rates. The Commission expressed no great disapprobation of this, saying simply: "From the local passenger tariff and distance table in effect on the Charleston & Savannah Railway on and after September 1, 1896, it appears that interstate passenger fares between Savannah and South Carolina points commence with 3 cents per mile to or from Sand Island, S. C., 20

[19] Munhall v. Pennsylvania R. R. Co., 92 Pa. St. 150 (1879).

[20] Savannah Bureau v. Charleston & Savannah Ry., 7 I. C. C. Rep. 601 (1898).

miles from Savannah, and with slight variations increase with distance up to a mileage rate of 3.86 cents to Fetteressa, 105 miles from Savannah and 10 miles from Charleston. The mileage rate between Savannah and Charleston, as stated above, is 3.826 cents. While in freight service the general rule is that the rate per ton per mile should decrease as distance increases, in passenger service a single mileage rate for all distances is often found to prevail. It is unusual to find either freight or passenger rates per mile increase with distance."

TOPIC B—GROUPING OF STATIONS.

§ 633. The system of grouping.

The railroad might make a separate rate for each station on its line, so that a charge must be established for each possible combination of two termini. This is the natural rule, and not an unreasonable one. But for various reasons it has become usual to group together for the purpose of fixing rates a number of neighboring stations, and make a uniform charge for any station in the group.

So common has this practice become, that it is often looked upon as natural; and one city has sometimes demanded as a right that it should be grouped with a neighboring city. For instance, Omaha applied to the Interstate Commerce Commission to be grouped with Council Bluffs (which is situated at the other end of a long and expensive bridge over the Missouri River), and to be given identical rates from Iowa points. The Commission held that there was no legal right to have stations grouped, and that a difference in rate was justified.[1]

§ 634. Grouping by reason of competition in the articles transported.

Grouping is often justified in order to preserve competition in commodities carried to market where a strict mileage rate would

[1] Commercial Club of Omaha v. Chicago & N. W. Ry., 7 I. C. C. Rep. 386 (1897).

give too great an advantage to the commodities produced at the nearest point to the market. Upon broad grounds of public policy, this is permitted in order to best develop the resources of the country. Upon these principles it was held reasonable to group all the mines in a certain locality, such as the Lehigh anthracite coal region.[2] The principles upon which this is done are well set forth in the following quotation: "Occasions have arisen when the competition of business interests, as urgent in its stress and as imperative in its demands as competition between carriers, has been relied upon by shippers as sufficient to constrain the grouping of rates from different points. A considerable extent of territory containing a large number of mines, quarries, or manufacturing establishments, has frequently been given identical freight rates upon the ground that otherwise the more distant points would be driven from the market and thus important industries might be ruined, resulting indirectly in serious loss of revenue to the road. This argument has even been pressed to the extent that manufacturers, for example, 150 miles from a common terminus, have claimed that they should receive the same rate given to others only 50 miles from the same point."[3]

§ 635. Grouping must be reasonable.

While grouping is permissible in a proper case, it must nevertheless be reasonable; and if distant points are grouped without some peculiar reason justifying it, the rate to the nearest of the grouped points must be deemed unreasonable.[4]

Even when grouping is resorted to in order to preserve competition in commodities, as where railroads entering New York grouped the stations which supplied the city with milk, it was

[2] Coxe v. Lehigh Valley R. R., 3 Int. Com. Rep. 460, 4 I. C. C. Rep. 535 (1891).

[3] Walker, Com. in Howell v. New York, L. E. & W. R. R., 2 Int. Com. Rep. 162, 2 I. C. C. Rep. 272 (1888).

[4] State v. Minneapolis & S. L. Ry., 80 Minn. 191, 83 N. W. 60 (1900).

held that it would be unreasonable to make a uniform rate for all milk stations to New York, but reasonable to establish zones at proper intervals by which all milk from stations up to a certain distance, say 40 miles, should pay the same rate, then all milk originating in the zone from 40 miles to 60 miles a slightly higher rate, and so on.[5] The Commission thus in effect compromises with the principle under discussion. It will not allow the natural advantages of nearby sources of supply to be altogether eliminated; on the other hand it will permit relatively slight differences between the different zones; and, as one notes, it will permit grouping all the stations within the zones at a flat rate whether say 41 miles or 59 miles.

§ 636. When uniform rate to a group of stations is justifiable.

Although it may be conceded that a slightly greater profit will be made on a traffic passing to the nearest grouped point than to the furthest point, the difference, if the stations are properly grouped, will not be sufficient to make the arrangement illegal. It is clear that the grouping must be so managed that the rate to the nearest point will not be unreasonable in itself, and the rate to the furthest point will be remunerative. These general principles are well set forth in the quotation which follows:

"It is said by way of argument that there is an inherent injustice in carrying the product of one locality at a less rate than that of another which lies nearer to the common market, because in that case the nearer shipper pays a part of the expense of transporting the freight of his rival a longer distance upon the

[5] These were substantially the facts and the decision in Milk Producers' Assoc. v. Delaware, L. & W. R. R., 7 I. C. C. Rep. 92 (1897). In Howell v. New York, L. E. & W. R. R., 2 Int. Com. Rep. 162, 2 I. C. C. Rep. 272 (1888), the Commission had held an arrangement for a flat rate not necessarily unreasonable even if it incuded all milk brought to New York from stations within 200 miles.

same train. This result does not necessarily follow, however. In cases where the rate is sufficiently high to afford a reasonable profit upon each portion of the traffic by itself, there are no losses upon the longer portion of the route to be made up by overcharges upon the remainder. Although the product of the most distant locality may yield a substantially less measure of profit than that of the nearer, nevertheless the traffic which pays the least profit to the carrier may pay its own entire transportation expense, and perhaps a good deal more. In that event there is nothing in its transportation which is saddled upon other communities, and the smaller profit which is made from the longest haul helps to support the facilities which the carrier is enabled to maintain for the common benefit of the entire route covered. In the present case it will not be contended by complainants that the milk business from even the most distant stations is done at any loss to the roads."[6]

§ 637. Basing points established.

Instead of grouping stations about a competitive point and charging a uniform rate, the prevailing custom now is to fix a certain rate to the competitive point (called the basing point), and to fix rates to other points in the group by adding in each case to the basing rate the local rate from that point to the station in question. Such a combination rate is on the face of it unreasonable, and it will be closely scrutinized;[7] and the competitive rate to the basing point plus the local is at any rate the extreme limit of charge.

After the passing of the Interstate Commerce Act, which was at first believed to prevent the reducing of a rate for a long

[6] Walker, Com. in Howell v. New York, L. E. & W. R. R., 2 Int. Com. Rep. 162, 175, 2 I. C. C. Rep. 272 (1888).

[7] Trammell v. Clyde S. S. Co., 4 Int. Com. Rep. 120, 5 I. C. C. 324 (1894); Cordele Machine Shop v. Louisville & N. R. R., 6 I. C. C. Rep. 361 (1895); Gustin v. Atchison, T. & S. F. R. R., 8 I. C. C. Rep. 277 (1899); Board of Trade v. Central of Ga. Ry., 8 I. C. C. Rep. 142 (1899).

haul below that for a shorter haul included in it, competitive points were grouped with a number of intermediate points, so that the carrier might compete without reducing his charge below intermediate charges. Since it has been decided that a carrier might in case of competition reduce the charges for a long haul below those for a short haul, this has become unnecessary, and the competitive points are now made basing points.

§ 638. Basing points justified.

The Supreme Court of the United States [8] has held that the Southern system of "basing points" is legal. Rates to non-competitive Georgia towns were arrived at by taking the Atlanta rate and adding to it the local rate back. The result of this was to make a higher rate in each case for the shorter haul; but all the rates were lower than they would be if the nearest competitive point to the west, Montgomery, had been taken as the basing point. The court upheld the rates, Mr. Justice White saying:

"When the situation just stated is comprehended, it results that the complaint in effect was that a method of rate making had been resorted to which gave the places referred to a lower rate than they otherwise would have enjoyed. In this situation of affairs, we fail to see how there was any just cause of complaint. Clearly, if, disregarding the competition at Atlanta, the higher rate had been established from New Orleans to the non-competitive points within the designated radius from Atlanta, the inevitable result would have been to cause the traffic to move from New Orleans to the competitive point (Atlanta), and thence to the places in question, thus bringing about the same rates now complained of. It having been established that competition affecting rates existing at a particular point (Atlanta) produced the dissimilarity of circumstances and conditions contemplated by the 4th section of the act, we think it inevitably

[8] Interstate Commerce Com. v. Louisville & N. R. R., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687 (1903).

followed that the railway companies had a right to take the lower rate prevailing at Atlanta as a basis for the charge made to places in territory contiguous to Atlanta, and to ask, in addition to the low competitive rate, the local rate from Atlanta to such places, provided thereby no increased charges resulted over those which would have been occasioned if the low rate to Atlanta had been left out of view. That is to say, it seems incontrovertible that in making the rate, as the railroads had a right to meet the competition, they were authorized to give the shippers the benefit of it by according to them a lower rate than would otherwise have been afforded. True it is, that by this method a lower rate from New Orleans than was exacted at LaGrange obtained at the longer distance places lying between LaGrange and Atlanta, but this was only the result of their proximity to the competitive point, and they hence obtained only the advantage resulting from their situation. It could be no legal disadvantage to LaGrange, since, if the low competitive rate prevailing at Atlanta had been disregarded, and the rate had been fixed with reference to Montgomery, and the local rate from thence on, the sole result would have been, as we have previously said, to cause the traffic to move along the line of least resistance to Atlanta, and thence to the places named, leaving LaGrange in the exact position in which it was placed by the rates now complained of."

TOPIC C—THROUGH RATES.

§ 639. Carriers may combine in a joint rate.

It is permissible for two carriers to combine upon a joint through rate over both lines, which shall be less than the sum of their separate rates.[1] In other words, it is entirely proper that two carriers should combine to form a single route, join in one haul, and name a single rate for the haul. It is not only

[1] St. Louis Hay & Grain Co. v. Illinois Cent. R. R., 11 I. C. C. Rep. 486 (1905). See, generally, Chapter XXXI.

permissible, but extremely desirable, that this should be done; and the lower through rate thereby secured is quite justifiable. "The through rate is almost universally less in proportion to distance than the local rate; the carriers can afford to make it lower; if they were compelled to measure the one by the other, there would be no inducement to form through lines and shippers would be annoyed by having to deal with a succession of local roads instead of with one road acting for all. But if the through rate is less in proportion than the local, some of the carriers, if not all of them, must accept for their division of the through rate a sum less than the local rate. This is very manifest. It is well known, also, that many influences affect the making of a through rate that may not bear at all, or if at all in less degree, upon the local rates. This is especially the case when there are competitive lines reaching points for which the through rate is made or through which the transportation is to be had. Such competition may in some cases force the making of a through rate which will barely pay the cost of moving the freight." [2]

§ 640. The entire rate must be reasonable.

The shipper or consignee has no direct interest in the way a joint rate is divided between the carriers, nor in the amount of the division received by each carrier. The entire through rate is what interests the public, and in so far as a carrier gives up a part of its fair division for the sake of obtaining business the public is not concerned.[3]

It is clear, of course, that the entire rate must not be so low as to be unremunerative, and thus burden the local traffic.[4]

As the rates for long distances cannot be exactly compared

[2] Lippman v. Illinois Cent. R. R., 2 Int. Com. Rep. 414, 2 I. C. C. 384 (1890).

[3] Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382, 433 (1903).

[4] Lippman v. Illinois Cent. R. R., 2 Int. Com. Rep. 414, 2 I. C. C. Rep. 584 (1889).

with those for short distances, the proportion received by one carrier out of a long distance through rate is not necessarily the measure of its share of a joint rate over a materially shorter distance; though it may be considered in determining the rightful relation of the two rates.[5]

§ 641. Share of separate carrier as evidence of unfairness of entire rate.

Although in the case of a joint rate it is the entire rate, and not the proportionate part which each carrier receives on the division, which directly interests the shipper, yet that division is not without significance in determining what are reasonable rates for the whole distance on the lines in question; and he is entitled to inquire into such division when he complains that the joint rate is unlawful, for the amount so received by the different carriers may throw light upon the reasonableness or justice of the aggregate charge.[6]

But plainly a railroad may charge more for transporting a local passenger between the two termini than it receives for transporting a through passenger over the same distance, in the division of the through rate with other railroads.[7]

§ 642. Through rate need not be a reduced rate.

While the fact that a through route extends over two railroads may lead to a lower rate than if it were over a single line, it may justifiably have the opposite effect; the rate may be

[5] Clements, Com. in Colorado F. & I. Co. v. Southern Pac. Co., 6 I. C. C. Rep. 488, 513 (1895). *Acc.* Daniels v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 458 (1895).

[6] Parkhurst v. Pennsylvania R. Co., 2 I. C. C. Rep. 131, 2 Int. Com. Rep. 78 (1888); Railroad Commission v. Savannah, F. & W. R. Co., 5 I. C. C. Rep. 13, 3 Int. Com. Rep. 688 (1891); Trammell v. Clyde S. S. Co., 5 I. C. C. Rep. 324, 4 Int. Com. Rep. 120 (1892); Warren-Ehret Co. v. Central R. R., 8 I. C. C. Rep. 598 (1900).

[7] Union Pacific Ry. v. United States, 117 U. S. 355, 29 L. Ed. 920, 6 Sup. Ct. 772 (1886).

justifiably lower between two termini when the route is over a single road than when it is over two roads. Thus in a case before the English Commission,[8] for discrimination in rates from one point to another as between two roads, one route was six miles over the A. railway, and seventy miles over two other roads; the other route was the same six miles over A. railway and seventy-three miles over a single other railway. It was held that the cheaper route over the single railway was justified since two hauls were more expensive than a single haul for the same distance.

Though not increased because of the joint carriage, the rate may well be maintained at the sum of the local charges of the carriers; and no objection can be raised to such a rate. No one has a right to demand that the through rate be a reduced rate.[9]

§ 643. Through rate may be given although transit is broken.

A very important feature in modern railroading is the permission given to the owners of goods in transit to have the advantages of the through rate upon paying a very small additional premium, although the transit is interrupted for a time to do something to the commodities in question at some intermediate point, to prepare them for market, or even to entirely change their form by manufacture of some sort. Thus the railroads not uncommonly grant the privilege of cleaning in transit, of bagging in transit, of compressing in transit, and of milling in transit.

As was pointed out in one case by the Interstate Commerce Commission:[10] "Shippers are not entitled as a matter of right to mill grain in transit and forward the milled product under

[8] Corporation of Birmingham v. Manchester S. & L. Ry., 10 Ry. & Can. Tr. Cas. 62 (1897).

[9] King v. New York, N. H. & H. R. R., 3 Int. Com. Rep. 272, 4 I. C. C. 251 (1890).

[10] Koch v. Pennsylvania Ry., 10 I. C. C. Rep. 675 (1905).

the through rate in force on the grain from the point of origin to the place of ultimate destination,[11] but allowance of the privilege by a carrier to shippers in one section must be without wrongful prejudice to the rights of shippers in another section served by its line. Considering the defendants as a single line, the granting of transit milling west of Pittsburg and denying it to millers at Harrisburg is not necessarily unlawful. The conditions on the Pan Handle in Ohio and Indiana may be very different from the conditions in eastern Pennsylvania, and it does not follow that the allowance of transit privileges in the former territory requires as a matter of law the like allowance in the latter territory. But these differences have not been shown nor their bearing explained by the testimony in this proceeding."

§ 644. Certain objections to the practice of giving privileges in transit considered.

The most thorough discussion of this problem of privileges in transit is in an opinion of the Interstate Commerce Commission [12] in regard to the practice of "floating cotton," the essential transportation feature of which was carrying the cotton to a compress, receiving it again in the compressed state, and transporting it to destination at the through rate in force from the point of origin. It was held that the carrier may, as part of a contract for through shipment, allow the cotton to be stopped off for the purpose of grading and compression; but the privilege enters into and becomes part of the service covered by the rate, and should be specified in the published tariffs. The Commission said in substance that this cotton is in no possible construction at the compress point for any other purpose than a temporary one in transit; and that although an indispensable element in every through shipment would seem to be

[11] Diamond Mills v. B. & M. R. R., 9 I. C. C. Rep. 311 (1902).
[12] Re Alleged Unlawful Rates for Cotton, 9 I. C. C. Rep. 121 (1899).

a contract for such through service, an agreement between the parties at the inception of the carriage that the freight was to go to some destination beyond to be designated later was enough. Meeting certain arguments against the practice, the Commission said:

"It is said that the identical cotton does not pass over the entire route, but that substitution takes place at the compress point. This is certinly true. If a carload of cotton leaves Hernando for Boston, it is quite probable that no single bale of that cotton ever goes to Boston. If the car in which it came to Grenada reaches that destination it is practically certain that it will be filled with other cotton, but is this in any way material? Every pound of Hernando cotton finally goes to some point beyond Grenada. It is true that a bale of cotton raised at Grenada may go from Grenada to Boston, by this process of substitution, at the Hernando rate, but in that event a corresponding amount of cotton from Hernando must go to some point upon the Grenada rate. However it may be in theory, there can be in fact no discrimination. Grenada cotton is bought upon and has the benefit of the Grenada rate, and cannot possibly obtain the benefit of any other rate, and Hernando cotton must go to a point beyond Grenada upon some published rate."

§ 645. Rebate on reshipment.

A through rate may be established, not by uniting on a single rate for one entire haul over two roads, but by charging the separate rate on the goods to the junction point, and then, upon the goods being there reconsigned and reshipped over a second road, paying a rebate on the charges of the first or of the second road. This is sometimes allowed when the goods are taken by the consignee at the junction point and there held for a considerable time, for the purpose of awaiting a favorable turn of the market.

Such reconsigned articles may in a proper case obtain a rebate, thus resulting in maintaining lower rates; but the rate may

lawfully remain higher than the through rate, and the incoming road may give a rebate which leaves its net rate higher than its proportion of a through rate. "The service of the carrier in handling reconsigned hay is more expensive as a general rule, if not invariably, than the service performed in cases of through shipment, while the reconsignment privileges in question must be of substantial value to the dealers at East St. Louis. In no instance shown does the difference appear to be unreasonable or otherwise in violation of the regulating statute. The circumstance that the reconsignment rate is sometimes the same as the proportion of the through rate does not warrant an inference of illegal conduct, or support the charge of unjust discrimination." [13]

§ 646. A through arrangement necessary to justify such privileges.

These privileges are only applicable to shipments intended from the outset to be through shipments. Thus in one proceeding before the Interstate Commerce Commission,[14] it appeared that the practice was to ship grain from points west of Kansas City to Kansas City upon the local rate. When this rate was paid an expense bill was delivered to the person paying it. If this expense bill was afterward delivered to a carrier leading eastward from Kansas City, that carrier would transport a corresponding amount of grain forward to Chicago, or any eastern point, not at the rate from Kansas City, but at the balance of the through rate from the original point of shipment. It was not at all requisite that this second lot of grain should be the original lot. Of this scheme the Interstate Commerce Commission said:

"The first question arising upon these facts would seem to be, Were the shipments under this practice through shipments, and

[13] Knapp, Chairman, in St. Louis Hay & Grain Co. v. Illinois Cent. R. R., 11 I. C. C. Rep. 486, 494 (1905).

[14] In the Matter of Alleged Unlawful Rates, 7 I. C. C. Rep. 240 (1897).

for that reason entitled to the through rate which they received? It is difficult to understand how they can be so treated. Apparently they had not a single incident of a through shipment, but upon the contrary the transportation from the point of origin to Kansas City was in every respect local. The rate was local. There was nothing upon any paper connected with the transaction which indicated that the grain was to be carried beyond Kansas City. As a matter of fact there was no definite purpose upon the part of its owner to carry it beyond. If it did finally go further, there was no present idea as to what point it would go. It might be consumed at Kansas City. It might be sent forward to Chicago. It might be transported to Liverpool. The object of the owner of the grain was simply to take it to Kansas City for the purpose of disposing of it there, without any thought as to its ultimate destination. When the grain was unloaded and put upon the market at Kansas City, it was not, in any possible construction, there temporarily in transit upon a through shipment. It had reached its destination. It had become Kansas City grain. When it was shipped out it must take the Kansas City rate, and the fact that it had come from a point farther west was no reason for giving it a different rate."

§ 647. Dangers in giving privileges in transit.

Loose practice in giving rebates on reconsigned goods may lead to a state of affairs which results in discrimination. Thus in St. Louis Hay & Grain Company v. Illinois Central Railroad,[15] a practice was shown of giving a rebate on reconsigned hay at East St. Louis. This reconsigned hay is carried at fixed rates provided for that purpose which are lower than local rates from East St. Louis, and do not depend upon the origin of the traffic. To secure a reconsignment rate the shipper is required to furnish evidence by expense bills that the hay forwarded, or

[15] 11 I. C. C. Rep. 486 (1905).

an equivalent tonnage of that article, has paid a local rate to East St. Louis. As the volume of hay currently received at that point exceeds materially the amount reshipped, on account of the large local consumption, there is usually if not always a surplus of expense bills and consequently no great difficulty in meeting the condition on which reconsignment rates are allowed. In point of fact these rates are applied to practically all reshipments. The Commission expressed the opinion that this misuse of the reconsignment rate was illegal.[16]

§ 648. **Through passenger accommodations.**

That special through arrangements may be made was well brought out in a recent complaint disposed of by the Interstate Commerce Commission. Defendant had numerous through daily trains between New York and Boston on which the through parlor car fare was one dollar; on all tranis *from* intermediate points the parlor car fare was 50 or 75 cents according to distance, and on three trains the parlor car rate was one dollar *to* any intermediate point. Complaint was made that the charge of one dollar to intermediate points constitutes unlawful discrimination. The Commission said: "We further find that the number of trains and parlor cars on which the lower parlor car rates to intermediate points are allowed, together with the hours at which such trains leave the respective terminals and arrive at intermediate stations, are reasonably sufficient for the accommodation of the public. Taking all the circumstances into account, including due provision for through passengers, it is not perceived that any real hardship or injustice results from the dollar charge to all points on the three trains in question. The defendant furnishes adequate parlor car accommodations at the lower rates for local and short-distance passengers, and the discrimination against such passengers by reason of the dollar

[16] See, also, Re Alleged Unlawful Rates, 7 I. C. C. Rep. 240 (1897); Re Rates and Practices of Mobile & O. R. R., 9 I. C. C. Rep. 373 (1903).

rate to intermediate points on three of defendant's trains is not undue or unreasonable. In the interest of through passengers the defendant had the right to make the regulation in question. In the case of Cleveland, C. C. & St. Louis R. Co. v. Illinois,[17] after discussing several cases called to its attention, the Supreme Court said: 'With no disposition whatever to vary or qualify the cases above cited, neither the conclusions of the court nor the tenor of the opinions are opposed to the principle we hold to in this case, that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic.'"[18]

TOPIC D—EXPORT AND IMPORT RATE.

§ 649. Export and import rates considered.

When the destination of goods shipped or their originating point is outside the country, so that the entire haul comprehends a partial haul within and a partial haul outside the country, it has been insisted that there could be no difference in charge between cases where goods were shipped to or from the port, and cases where that was a port of export or import and the haul was only partially within the country. It would seem that the ordinary principles governing through rates and local rates should apply to the situation and that a lower proportionate rate might therefore be given to the goods designed for export or coming as imports as compared with goods shipped to or from the port.

§ 650. Import rates may be regulated by competition.

The question was first definitely settled in connection with the New Orleans import rates.

The Texas & Pacific Railway Company made in 1892 through rates from Liverpool and other foreign ports to San

[17] 177 U. S. 514, 44 L. Ed. 868, 20 Sup. Ct. Rep. 722 (1904).
[18] Hewins v. New York, N. H. & H. R. R., 10 I. C. C. Rep. 221 (1904).

Francisco, Cal., the carriage being by steamship from Liverpool to New Orelans, and by railway over the lines of the Texas & Pacific Company, in connection with those of the Southern Pacific Company, to San Francisco. The amount of these through rates was less, sometimes not more than one third of the rates charged by the Texas & Pacific Company for transporting similar traffic from New Orleans to San Francisco. It might happen that for carrying the same merchandise in the same car from New Orleans to San Francisco the rail carrier would not receive more than one sixth as much when the merchandise was imported through the port of New Orleans as if it had originated or been manufactured at that point. The reason for this was alleged to be that the through rate from Liverpool to San Francisco was determined by the price of transportation either by sailing vessel around Cape Horn, in the case of certain kinds of commodities, or by steamship and rail across the Isthmus of Panama, in the case of other commodities. The Texas & Pacific insisted that these through rates were absolutely fixed, and that it must either take the traffic at that figure or abandon it altogether.

The Interstate Commerce Commission held that as a matter of law, foreign competition could not be considered, and ordered the Texas & Pacific, and other roads concerned in the same litigation, to desist from allowing the discriminating rate.[1] This order the Texas & Pacific Company refused to obey; the matter was taken to the courts, and finally to the Supreme Court of the United States.[2] The Supreme Court reversed the ruling of the Commission on the point of law. The court held that conditions abroad as well as conditions existing in the United States should be considered; that the interest of the carrier and the consuming community as well

[1] New York Board of Trade v. Pennsylvania R. R., 4 I. C. C. Rep. 447, 3 Int. Com. Rep. 417 (1891).

[2] Texas & Pacific Ry. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666 (1896).

as the producing community must be taken into account; and that there was no hard and fast rule which prohibited the carrier, in furtherance of its own interest and the interests of its patrons, from accepting a less sum for the transportation of imported merchandise from the port of entry to an interior point than it charged for the transportation of domestic merchandise between the same points. Regarding the whole charge, from originating point to destination as a single through charge, therefore, there is nothing in the law to prevent the domstic carrier from receiving as his share of the through charge less than his local charge for the same haul.[3]

§ 651. Export rates regulated by competition.

In the same way it is clear that export rates may be regulated by competition, and that the inland portion of a through export rate may reasonably be less, in a proper case, than the rate for the same haul when the traffic terminates at the exporting port. This was thoroughly considered by the Interstate Commerce Commission in the case of Kemble v. Boston & Albany Railroad.[4] In that case it appeared that the inland rate from Chicago to Boston was two cents higher than the rate from Chicago to New York; but the export rate to the two ports was the same. This was managed by allowing a rebate of two cents on goods which after arriving at Boston were actually shipped abroad. The Commission held the practice legal; Mr. Commissioner Prouty saying: "Taking Chicago as the point of origin, Liverpool as the point of destination, and grain, which is the most important item of export, as the subject of traffic, it is evident that grain can pass from Chicago to Liverpool, either through the port of New York or through the port of Boston, and that in so doing it is transported to such port by rail and from such port by ship. It is also evident that it

[3] See, to the same effect, Mansion House Assoc. v. London & S. W. Ry., 9 Ry. & Can. Tr. Cas. 20 (1895).

[4] 8 I. C. C. Rep. 110 (1899).

will choose the route by which it can go the most cheaply. Investigations in other cases before the Commission show that a difference in the freight rate of between one-fourth and one-eighth of a cent per bushel determines the route by which grain shall be exported. Now, the ocean freights from Boston and New York are substantially the same. It follows, therefore, that the inland rate must also be the same. It has been decided that a differential of substantially 2 cents per hundred pounds may be properly made on domestic grain against Boston, but if the export rate were 2 cents higher to Boston than to New York, no traffic would move through the port of Boston. The object of these two rates, therefore, is to equalize the export rate between the ports of Boston and New York. The export rate to Boston is not in reality a Boston rate at all, but is in essence the inland division of a through rate through that port to foreign ports. That the inland carrier may receive in such case for its division a sum less than the domestic rate has been, as we have just seen, determined by the Supreme Court of the United States; hence the thing accomplished by the making of these two rates is not, as a matter of law, illegal."

§ 652. Foreign competition justifies only necessary difference in rates.

But while foreign competition may be considered in fixing the inland share of the through rate, the difference thus justified between the inland and the export or import rate is only such difference as is necessary to meet the competition. The Supreme Court in Texas & Pacific Railway v. Interstate Commerce Commission[5] distinctly pointed out that this was a question of fact to be determined in each case, and a question which was not raised in the actual litigation. "The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of

[5] 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666 (1896).

fact, to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence. . . The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination; much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable,—especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity."

§ 653. Limitations upon making export and import rates.

That foreign business must not be unduly favored at the expense of domestic business was expressly pointed out by the Interstate Commerce Commission.[6]

"The decision of the United States Supreme Court in Texas & Pacific Railway Company v. Interstate Commerce Commission, *supra,* has been understood in some quarters as virtually removing import and export traffic from the jurisdiction of the Commission. Such is not by any means its scope or effect. That decision simply broadened the power of the Commission in reference to such traffic. If any individual or locality feels itself aggrieved by the rates made upon export or import business as compared with domestic business, the Commission has full authority to consider and pass upon that grievance. The propriety, as a matter of fact, of the rates maintained by the Texas & Pacific Railway Company has never been upheld by the decision of any tribunal. It has never been decided that that company may transport boots and shoes for the English manufacturer from New Orleans to San Francisco for one-sixth the amount charged the American manufacturer for the same service, but merely that, in determining whether such rate constitutes an unjust discrimination or an

[6] Kemble v. Boston & A. R. R., 8 I. C. C. Rep. 110, 115 (1899).

undue preference, the interest of the carrier and the consumer should be taken into account as well as that of the producer."

It was accordingly held by the Commission, in the case of New York Produce Exchange v. New York Central & H. R. Railroad,[7] that the inland portion of an export rate through New York must be no less than the inland rate from the originating point to New York. Nothing was shown in the case to justify a difference in rates; and it is no doubt the fact that no differential is needed in order to secure shipments for export through New York.[8]

[7] 3 I. C. C. Rep. 138, 2 Int. Com. Rep. 553 (1889).

[8] *Acc.* Mansion House Assoc. v. London & S. W. Ry., 9 Ry. & Can. T. Cas. 20 (1895).

CHAPTER XX.

THE RATE AS AN ENTIRETY.

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§ 661. Nature of a rate.

In concluding this general discussion of the law governing railroad rates, it is necessary to point out certain characteristics of the rate itself which seem to require consideration. The separate rate is the definite charge fixed by the person conducting a public employment as the price demanded for performing the service asked. The most salient characteristics of a rate, considered abstractly, is that it is an entirety, the single charge for the whole service which is performed. Illustrations of this characteristic of the particular rate are collected in this chapter, as it is a matter of continual importance to those who have dealings with a public service company. such as the railroad corporation is.

TOPIC A—THE UNIT FIXED BY REGULATION.

§ 662. **Characteristics of the rate as a regulation.**

It is natural in public calling in the generality of cases that things are done by rule. The very character of the business usually dictates this policy. Public businesses are commonly carried on upon a large scale; and action according to rules fixed in advance is always found necessary for the proper conduct of any great business. This applies to charging compensation as much as it applies to any other thing done in carrying on the business. It is therefore plainly consistent with public duty for those who manage a public service to establish a schedule of rates as the basis of charges. A rate thus fixed is a regulation, and has the legal characteristics pertaining to a regulation made by a public service company to govern the dealings between itself and the public. Thus a schedule of rates once duly established will be presumed to be reasonable unless the contrary is shown. It will be recognized that some minor inequalities are unavoidable in the application of all schedules. It will be considered proper to publish these rates so that a person dealing with the public company may know with some certainty how much he will be charged. And it will be held bad practice to change established rates without giving notice. All these are generally true of other regulations, and it is submitted that they ought to be held as to rates.

§ 663. **Established classification prima facie reasonable.**

Where the carriers establish a classification and continue it in operation for a considerable time, it may fairly be inferred that the classification is a reasonable one, and it will be so presumed; and the burden of showing the charge unreasonable is on the party, whether carrier or shipper, who proposes a change.[1] "The continuance of a given rate is not conclusive

[1] In re Charges on Food Products, 3 Int. Com. Rep. 93, 4 I. C. C. 43 (1890).

evidence of the reasonableness of that rate; but when a railway company advances a rate which has been for some time in force, the fact of its continuance is *in the nature of an admission* against that company which tends to show the unreasonableness of the advance."[2]

§ 664. No presumption from continuance of classification under order of commission.

Where, however, a classification is adopted and maintained under an order of the Interstate Commerce Commission no such presumption can be made, even though the Commission has no power to enforce its order, since the carrier does in fact obey the order, and does not act voluntarily and upon its own judgment. On this point Mr. Chairman Knapp said: "The carriers classified soap in carloads as fifth class freight originally, and only changed it to sixth class in compliance with our order in 1891. However limited the compulsory effect of an order by the Commission may be in the present state of the law, compliance with its requirements cannot be regarded as voluntary action by the carriers. There is nothing to show that the carriers would have changed soap in carloads to sixth class in 1891 or later if no order requiring that to be done had been issued. On the contrary, the carriers' representatives have insisted in this case most strenuously that they have always been dissatisfied with the order of 1890 which was complied with in June of the following year. However that may be, it seems clear that the presumption as to the reasonableness of rates long kept in effect by carriers as a voluntary act on their part does not attach in this case. It may be said, in view of the fact that orders of the Commission can only be enforced by action in the Federal courts, that long compliance with an order of the Commission is in effect voluntary; but we think, when complaint is made to the Commission, and the case goes

[2] Holmes v. Southern Ry., 8 I. C. C. Rep. 561 (1900).

to hearing and decision, and order against the carriers is issued with which they comply, that there is a marked distinction in the respect here referred to between rates thus established and like or similar rates applied by the carriers on their volition, and that this distinction is sufficient to remove the presumption of the reasonableness of sixth class carload rates for soap which would arise if such rates had been voluntarily accorded since June, 1891, without the intervention of an order by the Commission." [3].

§ 665. Publication of change of rate requisite.

It would seem to follow from the assumption that the making of a rate is like the establishment of regulation that like other regulations rates should not be changed without publication of the fact. This matter is often covered by statute, but without statute there is a certain common law upon it, as the extract from an early case which follows will show.[4] "The auditor, for the purpose of presenting the question to the determination of the court, rejected evidence offered by the defendants tending to prove that prior to the 22d of February, 1855, and down to that time, the plaintiffs had transported for them large quantities of ice from Groton at a much less rate of compensation than the amuont charged in their account under date of the 31st of January of that year, without having given them notice, and without their knowledge, of any intention to increase the charge for such service. This evidence was rejected, for the reason that the directors of the plaintiff corporation had, prior to the transportation of the ice in the last named item, fixed and raised the rate of transportation of ice on their road from Groton to ninety cents per ton. This evidence ought to have been received. In the absence of any special contract between the parties, it

[3] Proctor & Gamble Co. v. Cincinnati H. & D. Ry., 9 I. C. C. Rep. 440, 488 (1903).

[4] Fitchburg Ry. v. Gage, 12 Gray (Mass.), 393, B. & W. 354 (1859).

had a tendency to show what was the understanding between the parties on the subject, and what the defendants had a right to consider would be the price to be charged to them for services performed in their behalf. If not controlled, it would and ought to have had a material effect upon determining the question concerning the compensation which the plaintiffs were entitled to recover. It might have been controlled either by showing that the defendants did in fact have notice of the new rate of charge established by the directors of the company, or that the notice was communicated generally to all persons, in the usual and ordinary manner, and with such degree of publicity that all persons dealing with them might fairly be presumed to have cognizance of the change."

§ 666. Classification sheet not varied by contract or representation.

The classification sheet, as has been seen, becomes binding from the moment of publication; and it cannot be varied by any private bargain or by any representation made to a particular shipper. "It will be convenient, before taking up the official classification for examination, to consider the complainant's claim that he was induced to locate at Ashtabula by the assurances of defendant's agents that his goods would be taken as sixth class. Some importance is attached to these assurances as establishing equities in his favor. On the other hand, it is contended by the defense that complainant was understood in the correspondence to be asking for rates upon blocks as they are when first cut from the log and with the bark on, and that it was with reference to such blocks that rates were given him. We do not however consider this very material. The official classification must have the same construction in favor of all other persons as is given in favor of complainant; no assurances to him, however honestly made or honestly relied upon, can entitle him to special rates. He could not have special rates under an

express promise, and quite as plainly he cannot have them because of any conduct of defendant's agents such as was shown in proof. The law requires uniformity and imparitality in the dealings of a carrier with all its customers." [5]

§ 667. Methods of charging in rate making.

It is for the management of the railroad to decide the basis upon which the rate shall be made up. More than this, it will commonly be not unreasonable to employ different methods in arriving at the proper rate in different cases; and if these differing methods are respectively used in appropriate treatment of varying subject matter, it is plain that this is not only consistent with public duty, but cases can even be imagined where not to do so would be inconsistent with public duty. But what has just been said is of course subject to the limitation that there must be no illegal discrimination of any sort by charging some by one measure and others by another.

It is, for example, plainly justifiable for a railroad in making its freight rates to charge for coal by the ton, but for paper boxes by the cubic yard. "The space required is rightly taken into account in the adjustment of freight charges, when the bulk is so considerable in comparison with weight as to occupy space which if taken up by heavier freight would yield larger receipts." [6]

But where the railway company fixed rates for packages containing a certain number of pounds, it was held that baskets of fish, of a size required by the business, should be rated by the pound and not by the size of packages as contained in the published rates of the railway company.[7]

[5] Cooley, Chairman, in Hurlbut v. Lake Shore & M. S. R. R., 2 Int. Com. Rep. 81, 2 I. C. C. Rep. 122 (1888).

[6] Commissioner Morrison in James v. East Tenn. V. & G. R. R., 2 Int. Com. Rep. 609, 3 I. C. C. Rep. 225 (1889).

[7] Woodger v. Great Western R. Co., 2 Nev. & Mac. 102, s. c. L. R. 2 C. P. 318 (1860).

§ 668. **A minimum rate is justifiable.**

A minimum rate is an excellent illustration of another characteristic of the rate considered as a regulation establishing a unit. Such a rate may be supported, although it operates in some cases somewhat differently than it does in others; for this is the normal operation of a regulation. It may therefore be true that some applicants are paying for a little more than others upon a pro rata basis, and the objection of discrimination cannot be taken. This matter of the mininmum charge was thoroughly canvassed in a recent case before the Interstate Commerce Commission,[8] where plaintiff, a shipper of chewing gum, objected to the defendants' rule providing that the minimum charge upon any single shipment of freight should be for one hundred pounds at the rate applying to the article.

The Commission said squarely: "It is reasonable and proper that carriers should fix a minimum weight and charge for the transportation of less than carload shipments. This is justified by the necessary expense and trouble attending the carriage of such shipments, large or small, which, aside from the actual manual labor involved, are practically the same irrespective of the weight or bulk of the package. Therefore, the only question presented for determination is whether or not the rule in force is reasonable, and not unjustly discriminative in its application.

"The amount of clerical work required in the shipment, transfer to connecting carriers and delivery of a shipment, the records of the same necessary to be kept, the division of the freight charges among the carriers participating in the transportation of this traffic, is shown to be considerable, and justifies a higher charge proportionally than for large shipments. Such higher charge is also justified by the limited car capacity of package freight as compared with carloads of other freight. Illustrative of the minimum revenue per carload, one witness

[8] Wrigley v. Cleveland, C., C. & St. L. Ry. et al., 10 I. C. C. Rep. 412 (1905).

testified to an instance of the carriage of a car of package freight aggregating 1520 pounds, for which the revenue on the 50 pounds minimum basis was only $4.36." [9]

§ 669. Where minimum is fixed excess may be charged for.

It would seem obvious that where a minimum is fixed it is not also a maximum; for it seems plain the company may make a minimum charge and at the same time require payment for any excess. Still the point was raised in one proceeding before the Interstate Commerce Commission,[10] the facts being that a practice had existed on the part of certain carriers of live cattle to make a carload rate irrespective of weight, leaving the shipper to load into the car as many cattle as he pleased and was able to put into it. The carriers substituted for this practice the rule that while naming a carlot rate they prescribed a minimum weight for a carload and then charged by the hundred pounds in proportion to the carlot rate for any excess over the minimum. This change was objected to by certain shippers, but the Commission held that the new rule was more just and reasonable than the practice it supplanted.

The course of its reasoning may be seen in the following extracts:[11] "*Prima facie* the system of charging by weight is more just than any other. It is the only system whereby the charge is made proportionate to the service rendered. It is the only system whereby inequalities as between shippers, resulting from differences in the size of cars, can be obviated. As long as those differences exist, there is always room for favoritism, unless the carload charge is accurately apportioned to the size of car; and this we think has never been attempted, for the reason, doubtless, that because of the great diversities it was seen to

[9] See Kibler v. Southern Ry., 64 S. C. 242, 40 S. E. 556 (1901).

[10] Leonard v. Chicago & A. R. R., 2 Int. Com. Rep. 599, 3 I. C. C. Rep. 241 (1889).

[11] Per Cooley, Commissioner, in Leonard v. Chicago & A. R. R., *supra*.

be impracticable. The reasons ought to be very imperative which would require the abolishment of the rule which excludes favoritism to make way for another which not only admits of but invites it.

"We are pointed to no such reasons in this case. The charge by the 100 pounds is not only *prima facie* most just, but it is in accord with the general practice of the carriers in making rate sheets for other commodities. The general rule is to charge by weight where weight can be a proper measure, and when a carlot rate is prescribed, to fix a minimum for the load to be taken as the carlot and to charge by the 100 pounds for any excess, just as is now done in respect to cattle by this carrier. The cases must be very few in which it would be deemed reasonable or admissible to allow the shipper of general merchandise to load up a car at discretion, without the quantity being taken into account in determining the carrier's charges."

§ 670. **Minimum weights with provision for refund of excess.** There may be cases, plainly enough, where the protection of the carrier may require that the shipper shall pay in the first instance upon a fixed minimum weight. In one complaint before the Interstate Commerce Commission [12] it was shown that the defendant railway had established minimum weights on cotton of 535 pounds per bale on shipments without certified weight, and that the defendant insisted upon payment of the freight charges specified in its expense bills when represented to the consignee, leaving the amount of any excess collected to be afterwards determined and refunded upon the filing by the consignee of the claim for overcharge.

On that point the Commission said: "We do not think that a plan of billing cotton at a proper estimated weight per bale should be deemed unlawful when actual weights cannot be ascertained without great inconvenience to the shipper or carrier,

[12] Phelps & Co. v. Texas & P. Ry., 6 I. C. C. Rep. 36 (1893).

and when charges are promptly adjusted by the carrier upon the basis of actual weights furnished by the consignee.[13]

TOPIC B—THE JOURNEY THE UNIT IN PASSENGER SERVICE.

§ 671. The journey is a single entire unit.

The journey for which a passenger has a right to be received and upon which he enters when he is received, is the whole transit from his point of departure to his destination; the entire journey which he means at that particular time to take. This journey is a single unit of service; for it the carrier is entitled to make a single charge, and the passenger is entitled only to an unbroken carriage. Neither party has a right to break this single unit of service into two. Furthermore, it is essential that the passenger when taking the train should have determined what journey he shall take, and should be ready to pay his fare for that journey. In the case of Fulton v. Grand Trunk Railway[1] it appeared that the plaintiff got upon the train without a ticket, and when asked for his fare declined paying then, as he said he had not made up his mind how far he should go. The conductor said he must decide, and afterwards, on his declining again on the same ground, stopped the train and put him out. This was held justifiable. Mr. Chief Justice Robinson said: "The conductor of the train has a right to know at once, not only whether the passenger is willing to pay his fare, but whether he can pay it; and if he could be put off in the manner the plaintiff was attempting to do, the passenger could in any such case continue to be carried as far as he meant to go without paying his fare, or having any means to pay at all, and might, when the train arrived at any station where he chose to leave it, step out of the train and evade payment."

[13] See Suffern, Hunt & Co. v. Indiana, D. & W. Ry., 7 I. C. C. Rep. 255 (1897).

[1] 17 Up. Can. Q. B. 428 (1858).

§ 672. **Fare demanded at any point on the journey.**

If demand for payment is not made in advance, it is none the less essential that payment should be made at once upon demand. The passenger does not obtain the right to remain on board the carrier's conveyance by promising to pay his fare in a short time,[2] or as soon as he decides how far he shall ride.[3]

"In my opinion the plaintiff refused to pay his fare within the meaning of that clause[4] when he failed to pay it upon being civilly asked for it, and that more than once, by the proper officer, and contented himself with saying that he had not yet made up his mind where he was going to, and that he would tell him when he got to some place ahead. We see that when a railway trains stops at any station every passenger feels himself at liberty to leave it freely, without waiting for the permission of any officer, or stopping till he can be released by one. This is a most convenient arrangement, both for the passengers and for the railway company, for by that means the passengers can depart instantly and without hesitation, and the company's officers are left at liberty to attend to the movement of the train, without having their attention distracted by looking after passengers in order to collect their fare. But this convenient method of doing business can only be provided by insisting rigidly on the passengers showing their tickets or paying their fare at the proper time, which is when they are asked to do so." [5]

It is of course not sufficient to tender less than the amount of the fare. So when a tender of fare for two persons was less than the amount of two fares, though more than a single fare, the refusal to carry both persons was justifiable.[6]

2 Nye v. Marysville & Y. C. S. R. R., 97 Cal. 461, 32 Pac. 530 (1893).
3 Fulton v. Grand Trunk Ry., 17 Up. Can. Q. B. 428 (1858).
4 14 & 15 Vict. ch. 51, sec. 21, sub-sec. 6.
5 Robinson, C. J., in Fulton v. Grand Trunk Ry., *supra*.
6 Eddy v. Elliott, 4 Tex. Civ. App. 248, 15 S. W. 41 (1890).

§ 673. Ticket entitles passenger to carriage for a single journey.

For the reason that the journey is an entirety, the ticket with which a passenger pays his fare is good only for the single journey on which the passenger is then engaged. It is good for any journey which is included within its terms, thus it is good from its starting point to any station short of its destination or from any station between its *termini* and the point of destination.[7] If presented for use and accepted in payment of fare it is at once used, and cannot be used again. So where a ticket from Buffalo to New York expired on the 26th of September, and the bearer took the train for New York on the evening of that day and his ticket was called for and punched, he had paid his fare for the whole journey, although the train did not reach his destination until the next day.[8]

§ 674. Passenger cannot take two journeys for a single fare.

A passenger cannot for a single fare travel part of the distance for which he has paid his fare upon one train and part on another; for that would be paying for a single journey and really taking two. A stop-over without the payment of an additional fare can be taken only by the express permission of the carrier.[9]

This law is summarized thus by Mr. Justice Deady in Roberts v. Koehler:[10] "A ticket for transportation on a railway between certain *termini,* which is silent as to the time when or

[7] Auerbach v. New York C. & H. R. R. R., 89 N. Y. 281, 42 Am. Rep. 290 (1882).

[8] Auerbach v. New York C. & H. R. R. R., 89 N. Y. 281, 42 Am. Rep. 290 (1882).

[9] Cheney v. B. & M. R. R., 11 Met. (Mass.) 121, 45 Am. Dec. 190 note (1846); State v. Overton, 24 N. J. Law, 435, 61 Am. Dec. 671 (1854); Cleveland, Col. & Cinn. R. R. v. Bartram, 11 Ohio St. 457 (1860); Vankirk v. Pennsylvania R. R., 76 Pa. 66, 18 Am. Rep. 404 (1874).

[10] 30 Fed. 94 (1887).

within which it may be used, does not authorize the holder to stop over at any point between such *termini,* and resume his journey thereon on the next or any following train. The contract involved in the sale and purchase of such a ticket is an entire one, and not divisible. It is a contract to carry the passenger through to the point of his destination as one continuous service, and not by piecemeal, to suit his convenience or pleasure." [11]

§ 675. Passenger cannot pay two partial fares for a single journey.

For this reason a passenger has no right to split up a single journey into two by tendering fare from the point of departure to an intermediate station, and then, continuing on the train, tender fare from the intermediate station to his destination, even though he might thus secure a cheaper passage by taking advantage of cheaper rates between two of the stations. This point was fully considered in the case of the London & Northwestern Railway v. Hinchcliffe.[12] The facts in the case were these: The defendant, intending to travel by a particular train from Huddersfield to Manchester on the plaintiff's railway, took a ticket to Stalybridge, an intermedite station, and after giving up this ticket on the arrival of the train at Stalybridge remained in the carriage and tendered to the plaintiffs' servants 7d., which was the amount of the fare from Staylbridge to Manchester, the difference between the fare from Huddersfield to Stalybridge and the through fare from Huddersfield to Manchester being 9d. The plaintiffs refused the amount tendered, but allowed the defendant to travel on in the same train to Manchester, and sued him for the excess through fare; it was held that the plaintiffs were entitled to recover.

[11] Citing 2 Ror. Rys. 971, § 10; 2 Wood, Ry. Law, § 347; Cleveland, &c., Ry. Co. v. Bartram, 11 Ohio St. 457; Drew v. Central Pac. Ry. Co., 51 Cal. 425.

[12] [1903] 2 K. B. 32.

On this principle it was held in an Australian case that a rule providing that no passenger should take a ticket at any intermediate station for the purpose of continuing his journey in the same train as that in which he arrived, except from some stopping place where booking clerks are not provided, was reasonable and valid.[13]

Mr. Chief Justice Darley said: "It has been pointed out that this by-law prevents a double evil. First, it prevents persons who live beyond a holiday district getting an advantage of cheap fares not intended for them. Secondly, it prevents dishonest persons from traveling without a ticket over portions of the journey. For instance, if this by-law were not in force, a person might, in coming from Goulburn to Sydney, take a ticket from Goulburn to the next station, and then travel on to Campbelltown, and take a ticket from there to Sydney; thus traveling over a considerable portion of the journey without a ticket. To obviate this, it would be necessary to look at the tickets at every station, which would lead to inconvenience and delay, not only to the railway department, but to the public. In the present case the respondent, by re-booking, obtained the advantage of the tourist rates between Moss Vale and Sydney, which were never intended for him. If he had remained in the train, and informed the guard that he wanted to go on to Sydney, he would have had to pay the full fare from Goulburn to Sydney."[14]

§ 676. Part of journey completed before collection of fare.

It not infrequently happens that a passenger has completed part of his journey before the fare is demanded and collected; and a passenger is sometimes found dishonest enough to attempt

[13] Davies v. Williamson, 21 N. S. W. L. R. (Law) 124 (1899).

[14] But see Horton v. Erie R. R., 83 N. Y. Supp. 733 (App. Div.), (1903). And compare Savannah B. of F. & T. v. Charleston & S. Ry., 7 I. C. C. Rep. 601 (1898).

to ride to his destination upon payment of fare for the remaining distance. That this attempt is illegal has been made plain. The journey in which he is engaged is the whole journey from his place of departure to his destination; and the fare which is due, and which alone is due, is the fare for the whole distance.[15] The same thing is true if for some reason he would have a legal right to leave the train at an intermediate station without paying fare, but instead of doing so chooses to remain on the train and complete his journey. This was the ground of the decision in a case decided by the Supreme Court of Missouri. In that case the plaintiff, bound on a journey from A to B, could not get a seat until he reached X, an intermediate station; and he then refused to pay fare from A to B, but instead of doing so tendered fare from X to B only. He was ejected for non-payment of fare, and the court held that the ejection was justified; though he might lawfully have left the train at X, the first station, without paying fare, since he could get no seat.[16]

§ 677. Resumption of journey by rejected passenger.

When because of the refusal of a passenger to pay his fare he is ejected from the train at a point between regular stations, he has no right to take the train again upon tendering fare, since the place is not one where any person has a right to demand that he be received as a passenger.[17]

In O'Brien v. Boston and Worcester Railroad [18] Mr. Justice Bigelow said: "After being rightfully expelled from the train,

[15] Manning v. Louisville & N. R. R., 95 Ala. 392, 11 So. 8, 36 Am. St. Rep. 225, 16 L. R. A. 55 (1891).

[16] Davis v. Kansas City, S. J. & C. B. R. R., 53 Mo. 317, 14 Am. Rep. 457 (1873).

[17] O'Brien v. Boston & W. R. R., 15 Gray (Mass.), 20, 77 Am. Dec. 347 (1860); Hibbard v. New York & E. R. R., 15 N. Y. 455 (1857); Pickens v. Richmond & D. R. R., 104 N. C. 312, 10 S. E. 556 (1889).

[18] *Supra.*

he could not again enter the same cars and require the defendants to perform the same contract which he had previously broken. . . . Besides, the defendants are not bound to receive passengers at any part of their route but only at the regular stations or appointed places on the line of the road, established by them at reasonable distances for the proper accommodation of the public. The plaintiff had therefore no right to enter the cars at the place where the train was stopped for the purpose of ejecting him. A person who had committed no breach of contract could not claim any such right; *a fortiori* the plaintiff could not."

In some cases it is held that even if he is expelled at a regular station and offers to pay the entire fare, he cannot demand further carriage, since he has forfeited his right to be carried on that journey.[19]

Where, however, the passenger had a ticket for the station at which he was ejected, but wrongfully claimed that his ticket entitled him to be carried further, he was entitled to take the train and ride on to his destination upon paying the additional fare.[20] Mr. Justice Guffy said: "Lebanon Junction is admitted to be a point where the train stopped, and it did not stop there for the purpose of ejecting the plaintiff, and after he had quietly and submissively yielded to expulsion he was entitled to the same rights and privileges that any other citizen or passenger had who wanted to go to Louisville, as he manifestly did, for he took the next train for that point."

§ 678. Passenger expelled at a regular station.

If the passenger is expelled at a regular station, where passengers have a right to demand reception, he certainly cannot take the train again without paying full fare from the original

[19] State v. Campbell, 32 N. J. Law, 309, B. & W. 145 (1867); Pease v. Delaware, L. & W. R. R., 101 N. Y. 367, 5 N. E. 37, 54 Am. Rep. 699 (1886).

[20] Louisville & N. R. R. v. Breckinridge, 99 Ky. 1, 34 S. W. 702 (1896).

point of departure to his destination, since what he desires to do is to continue the original journey.[21]

In Pennington v. Philadelphia, Wilmington and Baltimore Railroad[22] Justice Bryan said in the course of an excellent discussion: "The plaintiff was required to leave the cars at Back River Station, on his journey back to Baltimore from Perryman's. After he had left the cars and while on the platform he offered to pay the conductor his fare from that station to Baltimore, but the conductor refused to give him admission to the cars. The plaintiff had already accomplished a portion of the return journey to Baltimore without paying his fare. He clearly was not entitled to be conveyed from Perryman's to Baltimore without paying fare for the whole distance. If he had been carried from Back River Station to Baltimore, on payment of the fare only from that place, he would have escaped payment of a portion of the fare: and so, in fact, he would have accomplished the return trip at a reduced rate. The company was under no obligation to carry him for less than the full rate for the whole distance, and so he was properly excluded from the cars."

§ 679. **Change of destination during the journey.**

If a passenger takes a train intending to go to an intermediate station, but during his journey changes his mind and determines to go further, he is still proposing to take a single journey, and must pay the difference between the fare he has already paid and the entire fare for the whole journey he decides to take; but upon doing so he would, it seems, have a right to stay in the train and complete his journey.[23] Such a

[21] Manning v. Louisville & N. R. R., 95 Ala. 392, 11 So. 8, 36 Am. St. Rep. 225, 16 L. R. A. 55 (1891); Pennington v. Philadelphia, W. & B. R. R., 62 Md. 95, B. & W. 147 (1883); Stone v. Chicago & N. W. R. R., 47 Iowa, 82, 29 Am. Rep. 458 (1878); Swan v. Manchester & L. R. R., 132 Mass. 116, 42 Am. Rep. 432 (1882).

[22] *Supra.*

[23] See Louisville & N. R. R. v. Breckinridge, 99 Ky. 1, 34 S. W. 702 (1896).

case was supposed in the argument of an Australian case, and it was urged that the passenger might be obliged to wait at the intermediate station for the next train. The court, however, said: "He need do nothing of the kind. All that he would have to do would be to remain in his seat, and tell the guard that he wanted to go on to Dubbo, and pay the difference in the fare."[24]

Even if he originally bought a ticket to the intermediate station he would not have a right to buy a ticket for the remaining portion of his journey; the railroad could insist that he pay the excess fare. On the other hand, the railroad could doubtless require that he buy a ticket for the remainder of his journey or else pay the fare for the entire journey, receiving back his ticket for the first part of it. In London & Northwestern Railway v. Hinchcliffe,[25] the facts of which have already been stated, Mr. Justice Wills said: "I am inclined to think it does not make any difference whether the passenger originally intended to book for Manchester or only for Stalybridge, because when he elected to stay in the train at Stalybridge and go on in that train without rebooking, he elected to propose to the company that they should make it one through journey for him from Huddersfield to Manchester; and if so then the company, by accepting that altered state of things, instead of turning him out and requiring him to rebook, made a further contract that they would carry him the whole distance from Huddersfield to Manchester, and therefore were entitled to charge the whole fare."

§ 680. Second journey on same train.

It was seen earlier in this chapter that a single journey is treated as an entirety. It does not, however, necessarily follow because a person goes beyond his first destination on the same

[24] Davies v. Williamson, 21 New So. Wales L. R. (Law) 124 (1899).
[25] [1903] 2 K. B. 32.

train that there may not really be two separate journeys. If the train waits long enough at the intermediate station, the passenger may complete the object of his first journey and undertake another quite independent journey on the same train. Thus where the defendant bought a ticket from M to F, intending to remain at F long enough to transact some business there and then go on to X; and the train waited at F forty minutes, which proved to be long enough for the defendant to transact his business, and he therefore took the same train for X, he was held not to be guilty (under the rule recited above) of rebooking at an intermediate station while upon the same journey.[26]

§ 681. **Non-payment of charges for prior carriages.**

The payment of compensation for previous carriages cannot be made a condition of accepting a passenger. Where one holding a season ticket had insisted on one occasion on riding without showing his ticket, it was held that he could be ejected from that train rightfully, but that he could not on that account be refused the right (which was offered to the public generally) of purchasing another season ticket.[27] The court considered such a refusal as inconsistent with the public duty of the common carrier, saying: "We think that this misconduct did not justify the company in excluding the relator thereafter from a privilege in which as a member of the community he was entitled to participate, in common with others of the public. Such a measure of punitive justice has not been granted by any statute, and if inflicted by any regulation of the company—which it is not—would be an unreasonable exercise of the company's power to make rules and regulations for the government of passengers."

[26] Flannery v. Hastings, 15 Austral. L. T. 1 (1893).
[27] Atwater v. Delaware, L. & W. R. R., 48 N. J. Law, 55 (1886).

§ 682. Effect of repudiation upon the applicants' rights.

If, however, there has been a dispute about the correctness of past charges, on account of which they have not been paid, and the shipper gives notice that he will pay for the present shipment only the amount claimed by him to be due, the carrier may of course refuse to carry the goods. The case of Yazoo & Mississippi Valley Railroad v. Searles,[28] while not involving precisely this point, really covers it both in its reasoning and in the effect of the decision. This was a bill for a mandatory injunction commanding the carrier to deliver to the plaintiff upon his switch cars consigned to him. The plaintiff had refused to accept the assessment for demurrage made against him by the Louisiana Car Service Association, and to pay the amount of demurrage so assessed or assessed in future by the association; and the defendant carrier refused on that account to make further delivery upon the plaintiff's switch. The court refused the injunction. In the course of his opinion Mr. Justice Truly expressed the following views on the point under consideration:

"No past violation of contract on the part of a consignee can justify a carrier in failing to discharge a present duty. But in the case at bar, according to the testimony for the appellant, not directly denied by appellee, appellee not only arbitrarily refused to pay demurrage charges which had accrued in the past, but expressed his intention of persisting in his refusal even should such charges be justly incurred in the future. If this be true, appellant was warranted in its refusal to further switch and place cars at appellee's warehouse. By delivering the cars at the warehouse appellant would have lost its lien, and could only have collected its charges from appellee directly, and he had already evidenced his intention of not paying. We know of no principal of law under which any one can announce an intention of not paying for a particular service, and still rightfully demand that such service shall be rendered; particularly

[28] 85 Miss. 520, 37 So. 939 (1905).

where the charge for such service is admitted to be just and reasonable, and is in fact paid by all others who enjoy the benefit of it."

TOPIC C—THE SHIPMENT THE UNIT IN THE CARRIAGE OF GOODS.

§ 683. **Maritime freight.**

Freight is a single thing, and cannot be broken up into two or more separate claims. The carrier may be entitled to it, or he may not yet have entitled himself to it; but he is entitled to the whole or nothing. It becomes important, therefore, to examine more closely into the nature of freight, and determine when the right to it accrues.

In the maritime law, freight is a separate maritime interest, distinct from vessel and cargo, and like them dependent upon the safety of the voyage. It comes into being as an existent interest as soon as the voyage begins, that is, at the moment when the vessel "breaks ground;" [1] but it is not earned until the voyage is completed, and it is for that reason at risk until it is earned. It may be insured, libelled, or transferred as a separate interest.

§ 684. **Right to compensation by agreement in case of carriage by sea.**

Wherever there is an agreement, on the one side to carry and on the other to pay freight, it is a necessarily implied term of the contract that the carrier shall be allowed to fulfil the contract on his side and thus earn the freight; and if the shipper takes away his goods before the voyage begins, and thus prevents the carrier from earning freight, the carrier is entitled to

[1] Curling v. Long, 1 Bos. & P. (Eng.) 634 (1797); Burgess v. Gun, 3 Har. & J. (Md.) 225 (1811); Bailey v. Damon, 3 Gray (Mass.), 92 (1854).

compensation.[2] The law is thus stated in the leading case of Tindall v. Taylor[3] by Lord Campbell: "We entirely agree to the law laid down by Lord Tenterden in his treatise (8th ed.), p. 595, and in Thomson v. Trail,[4] when applied to a general ship, that 'a merchant, who has laden goods, cannot insist on having them relanded and delivered to him without paying the freight that might become due for the carriage of them, and indemnifying the master against the consequences of any bill of lading signed by him.' It is argued that there can be no lien on the goods for freight not yet earned or due; but when the goods were laden to be carried on a particular voyage, there was a contract that the master should carry them in the ship upon that voyage for freight; and the general rule is that a contract once made cannot be dissolved except with the consent of both the contracting parties. By the usage of trade, the merchant, if he redemands the goods in a reasonable time before the ship sails, is entitled to have them delivered back to him, on paying the freight that might become due for the carriage of them, and on indemnifying the master against the consequences of any bills of lading signed for them; but these are conditions to be performed before the original contract can be affected by the demand of the goods. It would be most unjust to the owners and master of the ship if we were to hold that upon a simple demand at any time the goods must be delivered back in the port of outfit."[5]

[2] Tindall v. Taylor, 4 E. & B. (Eng.) 219 (1854); Bailey v. Damon, 3 Gray (Mass.), 92 (1854).

[3] *Supra.*

[4] 2 Car. & P. 334.

[5] Cases which lay down a right to the entire amount of freight are: Tindall v. Taylor, 4 E. & B. (Eng.) 219 (1854); Bartlett v. Carnley, 6 Duer (N. Y.), 194 (1856); Van Buskirk v. Purinton, 2 Hall (N. Y.), 561 (1829); Collman v. Collins, 2 Hall (N. Y.), 569 (1829). On the other hand, the following cases point out the possibility of reducing the amount of damages: Burgess v. Gun, 3 Har. & J. (Md.) 225 (1811); Bailey v. Damon, 3 Gray (Mass.), 92 (1854); Clemson v. Davidson, 5 Binn. (Pa.) 392 (1813).

§ 685. **Right to freight on land.**

Freight due for land carriage under the common law, though it derives its name from maritime freight, is of a different nature. There is no separate distinct interest, apart from the *chose in action* which the carrier has to recover his charges. It is, therefore, not quite literally accurate to speak of freight coming into being, under the common law, at the particular moment when the carriage begins. Freight which is due because of an express agreement or because of the provisions of the common law is not earned until delivery, by the carrier, as will be seen; but on the other hand the carrier obtains by the agreement or by the law a right to earn it by completing the carriage just as soon as delivery is made to him. After possession is given to the carrier, the owner cannot repossess himself of the goods without becoming liable to make payment.

There seems, however, to be a difference as to the amount due the carrier before the journey has begun and that due after the carrier has actually begun to carry. In the former case damages alone would be due. But in the latter case the carrier is entitled to the whole amount of freight. The owner who takes his goods before they have arrived at their destination, but after they have been put in transit, must pay the full amount of the freight. Full performance of the carriage is a condition precedent to liability; and by taking his goods during the journey the owner has waived further performance of the condition and must therefore fully perform on his side.[6]

§ 686. **Effect of carriage over a portion of the journey.**

Where the carriage is interrupted when partly completed, since there is no delivery at the destination, the freight is not due; and since freight is an entirety there is nothing which can

[6] Shipton v. Thornton, 9 A. & E. (Eng.) 314 (1838, *semble*); Violett v. Stettinius, 5 Cr. C. C. (Dist. Col.) 559 (1839); Braithwaite v. Power, 1 N. Dak. 455, 48 N. W. 354 (1891).

properly be recovered, in the absence of a new agreement. In the case of Luke v. Lyde,[7] to be sure, Lord Mansfield attempted to establish the doctrine that compensation proportioned to the distance the goods were carried, that is, freight *pro rata itineris,* might be recovered where the carrier was not at fault; but the attempt failed, and it is well settled that where the carriage is not completed, even though the carrier is not in fault and the owner receives a benefit, freight *pro rata itineris* cannot be recovered.[8] If, however, the owner voluntarily receives the goods short of destination by mutual consent of himself and the carrier, there is a novation, one term of which is the implied agreement to pay reasonable compensation, which is freight *pro rata itineris.*[9]

Where the goods arrive at their destination and are offered for delivery by the carrier, but by the law of that place no delivery can be made, the carrier's obligation is fulfilled and he is entitled to freight.[10] So where at the port of destination a vessel was not allowed to land part of her cargo, consisting of petroleum, but other goods were landed, it was held that freight was earned on the petroleum.[11]

§ 687. No freight without delivery.

As the whole freight is an indivisible unit, it is obvious that without some new arrangement between the parties the carrier will not be entitled to any freight whatever for goods not delievered at the destination. No matter how little the carrier may lack of making the required delivery, only an absolute

[7] 2 Burr. 882 (1759).

[8] Hunter v. Prinsep, 10 East (Eng.) 378 (1808); Vlierboom v. Chapman, 13 M. & W. (Eng.) 230 (1844); Caze v. Baltimore Ins. Co., 7 Cr. (U. S.) 358, 3 L. Ed. 370 (1813); Western Transp. Co. v. Hoyt, 69 N. Y. 230, 25 Am. Rep. 175, B. & W. 287 (1877).

[9] The Propeller Mohawk, 8 Wall. (U. S.) 153, 19 L. Ed. 406 (1869); The Teutonia, L. R. 3 Adm. 394 (1871).

[10] Cargo ex "Argos," L. R. 5 P. C. 134 (1873); Morgan v. Insurance Co., 4 Dallas (U. S.), 435, 1 L. Ed. 907 (Pa., 1806).

[11] Cargo ex "Argos," *supra.*

fulfilment of his obligation can entitle him to any freight whatever.[12] To quote from one case:[13] "The consignor is not bound to pay until the transportation is completed in accordance with the contract, but he may not prevent the master's earning his freight. If he takes possession of the goods short of their destination, when the master, not in default, is willing and able to complete the transportation, he must pay full freight. He has prevented or waived the performance of the condition precedent. The law, therefore, regards it as performed. It is true that in this case the performance was prevented by the consignee, and not by the shipper; but in this respect the consignor is represented by the consignee, and the former is responsible for the acts of the latter. The consignor has done his full duty to the consignee when he has paid or agreed to pay freight to a certain point. If the consignee sees fit to take the goods at some other place where the transportation is only partially completed, and when the master is able and willing to perform his contract, he, the consignee, can make no claim against the consignor, and the latter should therefore pay the freight which the master was able, willing, and had a legal right to earn. There can be no action unless delivery is either made or prevented from being made by the act or fault of the shipper or consignee."

§ 688. Freight indivisible as a rule.

Where goods are shipped in a single shipment the freight cannot be broken up, and a *pro rata* amount charged for a part delivered. Thus the carrier, offering part, cannot libel it for freight,[14] and where part has been delivered, and the carrier

[12] *Acc.* Brittan v. Barnaby, 21 How. (U. S.) 527, 16 L. Ed. 177 (1858); McCullough v. Hellweg, 66 Md. 269 (1886); Lane v. Penniman, 4 Mass. 91 (1808); Harris v. Rand, 4 N. H. 259, 17 Am. Dec. 421 (1827); Western Transportation Co. v. Hoyt, 69 N. Y. 230, 25 Am. Rep. 175, B. & W. 287 (1877); Braithwaite v. Power, 1 No. Dak. 445, 48 N. W. 354 (1891).

[13] Braithwaite v. Power, *supra.*

[14] In re Vitrified Pipes, 14 Blatch. 274, Fed. Cas. 10,536 (1877), reversing 5 Ben. 402, Fed. Cas. 14,280 (1871).

fails to deliver the remainder, he is entitled to no freight.[15] Thus in a case where lumber was shipped to San Francisco and part of it was lost on the voyage, the court held that if the whole amount shipped constituted a single unit, which was not delivered, no freight was due. At the trial the defendant offered parol evidence that the several articles named in the bill of lading were originally obtained and prepared and fitted for one house, and intended to be put together as such in San Francisco. To this evidence the plaintiffs objected; but the judge admitted it, and instructed the jury that if they believed that the articles enumerated in the bill of lading constituted the parts of one house, and the portions lost were lost by reason of their being improperly stowed on deck, and were a substantial part of the house, without which the house would be wholly incomplete, and of no practical utility as a house, in short, no longer the article which was shipped, then, the freight being payable on the whole in one entire sum, the plaintiffs could not recover freight for the lumber actually carried, and which arrived at San Francisco, although the lost articles could be easily supplied in the market by the purchase of others of like character.

This charge was held to be correct. Mr. Justice Bigelow said: "Unless freight is wholly earned by a strict performance of the voyage, no freight is due or recoverable. The contract of the carrier is indivisible, and he can recover for no portion of the voyage that has been made, until the whole is finished and the goods have reached their destination."

§ 689. Entire freight when goods arrive damaged.

If the goods arrive *in specie,* but have been damaged without fault of the carrier, entire freight is due.[16] If, however,

[15] Western Transportation Co. v. Hoyt, 69 N. Y. 230, 25 Am. Rep. 175, B. & W. 287 (1877).

[16] Lawrence v. Denbreens, 1 Black. (U. S.) 170, 17 L. Ed. 89 (1862);

the goods do not arrive *in specie,* though through no fault of the carrier, no freight whatever is earned.[17] If they arrive damaged by fault of the carrier, so long as they are still *in specie,* the owner cannot refuse to receive them. In England he must pay the entire freight, and recover damages for the injury as a separate matter.[18] In the United States, however, he may if he chooses deduct from the freight the damage to the goods.[19] As, however, no excess of damage can be recovered in that way and if recoupment is made no action will lie for the excess of the damage, this course is not wise unless the amount of damage is less than the freight.

The whole question is well summarized in the extract which follows: "It may happen, however, that goods existing *in specie* when brought to the place of destination are so deteriorated in condition as not to be worth the freight; and then arises the question whether the merchant is bound to pay the freight, or is at liberty to abandon the goods to the shipowner for his claim. In considering it, the causes from which the deterioration in the merchandise may proceed must be distinguished. If it proceeds from the fault of the masters or mariners, the merchant is entitled to a compensation and may recover it against the owners or master. On the other hand, if the deterioration proceeds from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation or only in the confinement and closeness of the ship, the merchant must bear the loss and pay the freight. The

The Cuba, 3 Ware 260, Fed. Cas. 3,458 (1860); Seaman v. Adler, 37 Fed. 268 (1889).

[17] Ridyard v. Phillips, 4 Blatch. 443, Fed. Cas. 11,820 (1860).

[18] Meyer v. Dresser, 10 C. B. N. S. 646 (1864).

[19] Relyea v. New Haven R. M. Co., 42 Conn. 579 (1873); Edwards v. Todd, 2 Ill. 462 (1837); Boggs v. Martin, 13 B. Mon. (Ky.) 239 (1852); Ward v. Fellers, 3 Mich. 281 (1854); Elwell v. Skiddy, 77 N. Y. 282 (1879); Leech v. Baldwin, 5 Watts (Pa.) 446 (1836); Humphreys v. Reed, 6 Whart. (Pa.) 435 (1841).

master and owners are in no fault; nor does their contract, though taken as the contract of common carriers, contain an insurance or guaranty against such an event." [20]

§ 690. Effect of partial delivery.

Where delivery is made of part of the goods only, it is sometimes possible to divide the shipment into separate units, and recover freight for as many such units as are delivered. This often happens where a large quantity of similar things are shipped, or commodities are shipped in bulk, and a portion is lost. Thus where a cargo of fruit was shipped and part of it decayed, freight was recoverable on that portion of the cargo which was delivered *in specie*.[21] In fact, it may in such a case be the duty of the carrier to permit the consignee to treat the shipment as an aggregate of units. For instance, when such a cargo was being unloaded upon the wharf for delivery, and only part of it could be unloaded in a day, it was held that the consignee had a right to take that portion of the cargo so unloaded upon paying freight *pro rata*.[22]

§ 691. Lien for entire charge on every part.

Freight earned on a single shipment is a charge as an entirety upon every part of the goods carried. Therefore, though part of the goods are voluntarily delivered by the carrier he may retain his lien upon the rest.[23] And even if the shipment is on different

[20] Maclachlan on Shipping, 469, as quoted with approval in Seaman v. Adler, 37 Fed. 268 (1889).

[21] The Brig Collenberg, 1 Black (U. S.) 170, 17 L. Ed. 89 (1862).

[22] Brittan v. Barnaby, 21 How. (U. S.) 527, 16 L. Ed. 177 (1859).

[23] Chicago & S. W. R. R. v. Northwestern U. P. Co., 38 Iowa, 377 (1874); Potts v. New York & N. E. R. R., 131 Mass. 455, 41 Am. Rep. 239, B. & W. 284 (1881); Fuller v. Bradley, 25 Pa. St. 120; Goldsborough v. McCulloch, 5 W. W. & A. B. (Victoria) 154.

vessels or on different trains, provided an agreement for the carriage of the whole was made, the freight is an entirety, and the lien may be enforced for the whole amount of the freight upon a single cargo or train-load.[24] This lien is effective against the shipper when he attempts to exercise the right of stoppage *in transitu*.[25]

§ 692. No lien except for specific charge.

The lien exists only for the single charge, and the carrier cannot hold the goods until the payment of an entirely unconnected prior charge; in other words, there is no general lien for freight.[27] Nor will notice by the carrier, to the shipper or even to the consignee, that he shall enforce a general lien on goods alter the case; since he must take them on the ordinary terms, an *ex parte* proceeding like a notice will not confer upon him any additional right to hold on lien.[28] A general lien may be created by express agreement between the parties,[29] but such an agreement will not enable the carrier to enforce against goods bought and shipped by the receiver of a bankrupt a lien for a debt of the bankrupt with whom the agreement was made. As to these goods, the receiver is an independent owner.[30] The re-

[24] Pennsylvania Steel Co. v. Georgia R. R. & B. Co., 94 Ga. 636, 21 S. E. 577 (1894); Lane v. Old Colony & N. R. R., 14 Gray (Mass.), 143 (1859).

[25] Pennsylvania Steel Co. v. Georgia R. R. & B. Co., 94 Ga. 636, 21 S. E. 577 (1894); Potts v. New York & N. E. R. R., 131 Mass. 455, 41 Am. Rep. 239, B. & W. 284 (1881).

[27] Rushforth v. Hadfield, 6 East (Eng.) 519 (1805); Leonard v. Winslow, 2 Grant (Pa.), 139; Goldsborough v. McCulloch, 5 W. W. & A'B. (Victoria) 154.

[28] Wright v. Snell, 5 B. & Ald. (Eng.) 350 (1822).

[29] Rushford v. Hadfield, 6 East, 519 (Eng., 1805); In re Northfield I. & S. Co., 14 L. T. N. S. (Eng.) 695.

[30] *Ex parte* Great Western Ry., 22 Ch. D. (Eng.) 470 (1882).

ceiver would, however, be bound as to goods received from the bankrupt.[31]

TOPIC D—ADDITIONAL CHARGES FOR SEPARATE PARTS OF THE SERVICE.

§ 693. **General principles as to additional charges.**

The entire service of the carrier in connection with a single shipment being conceived of as a unit, it should follow that only one charge may be made, covering the entire unit of service. Ordinarily this is true. The railroad company cannot make a variety of different charges for the facilities it uses and the servants it employs; for instance, it would be absurd for it to make a block signal charge or an engineer charge. It would seem to be the duty of the railroad to equip itself fully for the service it undertakes, and then to make a single rate to the shipper who wishes the transportation of certain goods to a certain place. This ought to hold true of all usual services which the carrier must render the shipper in the line of its duty, but as to services outside its obligation to the shipper it may render a separate bill if it pleases. More than this, there are, it must be admitted, certain extraordinary services in special kinds of shipments which are not required by shippers generally, and for which, it seems, it is more convenient, if indeed not more just, to make a separate charge.[1]

§ 694. **Whether extra charges should be made.**

From what has been said it will have been seen that in the United States ordinarily the single rate includes all charges.

[31] In re Northfield I. & S. Co., 14 L. T. N. S. (Eng.) 695.

[1] The status of these additional charges is fixed oftentimes by statutory provisions.

Upon the European continent freight rates do not appear to be made in this way. There is, first of all, a terminal charge, which applies to all traffic, to which a charge for movement is added. In England at the present time a shipper may require the railroad company to segregate the rate, determining what part of it is fairly a terminal charge, and if he does not take advantage of the terminal facilities, he may demand under some circumstances a reduction in the rate to that amount; but, with us, the rate ordinarily includes the cost of delivery. It would seem to follow that extra charges should not generally be made by the carrier for the use of its facilities in delivering his property to the consignee; but this is not altogether agreed.

§ 695. Foreign system of itemized charges.

As an example of the English system of itemized charges for railway charges, the following abstract of a leading case[2] is printed. As to one item, switching, the railway company claimed payment for shunting services performed by them in respect of the Salt Union traffic to or from their sidings at Malkins Bank and Wheelock, respectively. The traffic was salt outwards and coal inwards; and it was proved that as the works at Malkins Bank were in three sets or separate parts, and there were serveral points at which they communicated by sidings with the railway, the business of delivering full coal trucks and collecting loaded salt vans, and of bringing back and taking away empties, was considerable. The Salt Union sent a man to meet each train as it arrived, and he pointed out the particular sidings into which he desired trucks inwards to be put, or in which there were loaded salt vans to be hauled

2 North Staffordshire Ry. Co. v. Salt Union, Ltd., 10 R. & C. T. Cas. 161.

out. The railway company calculated that the time their goods trains were detained while the train engine was occupied in uncoupling trucks ready to go in the direction in which the train was traveling, averaged per diem at Wheelock one hour, and at Malkins Bank one hour. It was held that "if the time occupied by the railway company's engine at the Salt Union's request or for their convenience in shunting the Salt Union's traffic to or from their Malkins Bank Sidings exceeds for each train twelve minutes, and to or from Wheelock sidings exceeds six minutes, that the railway company may charge the Salt Union for time over the said twelve minutes and six minutes, respectively, during which the railway company's engine is occupied in shunting such traffic at the rate of 7s. per hour."

§ 696. Charges for service before carriage is undertaken.

It would seem that the only basis for making additional charges against the shipper would be for matters connected with the carriage which the shipper expressly or impliedly authorizes to be done in his behalf. Thus it would seem to follow that as respects services precedent or subsequent to the carriage the carrier cannot dictate, and if the shipper chooses to perform them himself or make other arrangements for their performance he should be free to do so. This is well brought out in the case of 318 1-2 Tons of Coal.[3] In this libel the issue was raised whether the railroad company could compel the shipper to employ the shovellers it furnished, charging ten cents per ton for their services, when the shipper could have obtained other shovellers for eight cents per ton.

Judge Shipman held that the railroad was not justified in demanding these charges; as in his opinion he discusses the question upon fundamental principles, a considerable extract is

[3] 14 Blatch. 453, Fed. Cas. 14,010, B. & W. 364 (1878).

given: "A common carrier is under an obligation to accept, within reasonable limits, ordinary goods which may be tendered to him for carriage at reasonable times, for which he has accommodation.[4] The carrier cannot generally discriminate between persons who tender freight, and exclude a particular class of customers. The railroad company could not establish the rule that it would receive coal only from certain barge owners, or from a particular class of barge captains. It carries "for all people indifferently." But, while admitting this duty, the company has declared that, for the convenience of the public, and in order to transport coal more expeditiously, and to avoid delays, it will receive such coal only, from barges at its wharf, as shall be delivered through the agency of laborers selected by the company. This rule is a restriction upon its common law obligation. The carrier, on its part, is bound to receive goods from all persons alike. The duty and the labor of delivery to the carrier is imposed upon the barge owner, who pays for the necessary labor. The service, so far as the shovelling is concerned, is performed, not upon the property of the railroad company, but upon the deck of the vessel. The company is virtually saying to the barge owner, You shall employ upon your own property, in the service which you are bound to render, and for which you must pay, only the laborers whom we designate, and, though our general duty is to receive all ordinary goods delivered at reasonable times, we will receive only those goods which may be handled by persons of our selection. The law relating to carriers has not yet permitted them to impose such limitations upon the reception or acceptance of goods."[5]

[4] Crouch v. L. & N. W. Railway Co., 14 C. B. 255 (1858).
[5] Beadell v. Eastern Counties R. Co., 2 C. B. N. S. 509 (1854).

§ 697. **Freight should cover the entire carriage.**

By the general principle governing this matter also, the freight rate should cover the entire carriage, taking the goods up, transporting them to their destination and setting them down. The general considerations which seem to dictate this fundamental rule are well set forth in the following quotation:

"The freight demanded covers the entire service of the carrier from depot to depot. It is in law the compensation, not only for the actual carriage, but also for the facilities furnished for loading and unloading. The service is a single one, and the compensation is likewise single. The law will not permit the charge for such single service to be divided. A carrier cannot make up its bill of charges in items,—one for loading, one for carriage, one for personal service of attendants, one for delivery, etc. The freight is not an aggregate of separate charges, but a single charge. This policy of the law is not because a particular shipper might not deal with the carrier as intelligently in the case of one method as in the other, but because the public is not so likely to deal intelligently with a series of items as with a single freight rate. The shipper may be intelligent or unintelligent, ignorant or educated, accustomed to business, or inexperienced in such affairs, deliberate and careful, or hasty and uninquiring. The service of the carrier is for one as well as the other. A single charge presents to him at once the whole problem. A series of charges might confuse him, and leave uncertain what, in the end, the aggregate would be." [6]

§ 698. **No separate charge for a part of the transit**

By the general principle governing this matter, the carrier, it seems, cannot divide up his route so as to make a separate charge for crossing a bridge. In the case of Southern Pacific Company v. Patterson, the railroad company had conveyed its right of

[6] Grosscup, J., in Union Trust Co. v. Atchison, T. & S. F. R. R., 64 Fed. 992 (1894).

[7] 7 Tex. Civ. App. 451, 27 S. W. 194 (1894).

way across a river to an independent bridge company, which exacted a toll of fifty cents for crossing the river. This was held to be an illegal exaction. The court seems to have thought that no separate charge could properly be made, and this, it is submitted, is the correct view. In the actual case the decision was that, whether or not a separate charge could be made, it could not at any rate exceed the maximum mileage rate imposed by law upon railroad companies.

§ 699. Charges for services during transportation.

It has been seen that in general the protection which the railroad gives to goods in transit is an integral part of an indivisible service, and it should therefore be all included in the single rate made for the carriage. But there are some extraordinary services required in the case of particular shipments which may so vary in each case that it will be plainly justifiable, if not requisite, to make separate charges for them. An illustration of this possibility seems to be the charge commonly made separately for icing at the initial point and re-icing during transit of a refrigerator car containing a shipment of perishable freight. For this is a service specially required for this class of commodities, varying for different things which require different degrees of refrigeration, definitely ascertainable so that it can be charged against the particular shipment and altogether separate therefore.

The status of the icing charge is not yet entirely determined at common law; although it would seem plain that it is so necessary a part of modern transportation that a railroad ought to see to it that refrigeration is provided at a reasonable price. In 1904 the Interstate Commerce Commission [8] expressed its opinion upon the question in the following language: "Whether the carrier is legally compellable to furnish ice for the refrigeration

[8] Re Transportation of Fruit, 10 I. C. C. Rep. 360 (1904). Accord Truck F. Asso. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895).

of such cars is more doubtful. In our opinion it should be. A refrigerator car is worth nothing without ice. These cars are usually employed to transport commodities to considerable distances. While the shipper might attend to the initial icing, he could not, without great difficulty, provide for re-icings en route. If the railways were to entirely withdraw from the performance of this service, and to insist that it should be done by the shipper in each instance, it would result in throwing the transportation of perishable commodities into the hands of a few large shippers who could afford to provide the necessary icing facilities." [9]

§ 700. Terminal facilities usually included in the rates.

The usual thing, therefore, is to assume that all use of terminal facilities in delivery of the property transported is included in the rate made for the carriage. This was squarely said by the Supreme Court of the United States in a case [10] where a railroad had entered into an arrangement by which consignees of cattle could not get them except at an established stock-yard, the proprietors of which charged yardage for the service. Mr. Justice Harlan in delivering the opinion of the court used the following language: " The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock-yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers

[9] See, also, Georgia Peach Growers' Ass'n v. Atlantic Coast Line, 10 I. C. C. Rep. 255 (1904); Consolidated F. Co. v. So. Pac. Ry., 10 I. C. C. Rep. 590 (1904).

[10] Covington Stockyards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, B. & W. 256 (1891).

when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock-yards which itself owns, maintains, or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession." [11]

§ 701. **Terminals regarded as connections.**

But despite these general principles, a scheme has been worked out which has received the sanction of the Supreme Court of the United States whereby the railroad may treat stock-yards which have their own railways as connecting carriers and add their rates for their services to the railroad's rate for its service. In deciding the validity of this, Mr. Justice White for the court said:[12] "As the right of the defendant carriers to divide their rates and thus to make a distinct charge from the point of shipment to Chicago and a separate terminal charge for delivery to the stock yards, a point beyond the lines of the respective carriers, was conceded by the Commission and was

[11] See accord Union Trust Co. v. Atchison, T. & S. F. R. R., 64 Fed. 992 (1894); and Butchers' & D. S. Y. Co. v. Louisville & N. R. R., 67 Fed. 35 (1895). But see Walker v. Keenan, 73 Fed. 758, 19 C. C. A. 668 (1896); and Central S. Y. Co. v. Louisville & N. R. R., 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339 (1905).

[12] Interstate Com. Com. v. Chicago, B. & Q. R. R., 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824 (1904), affirming 103 Fed. 249, 43 C. C. A. 209 (1900), and 98 Fed. 173 (1899).

upheld by the Circuit Court of Appeals, no contention on this subject arises. If, despite this concurrence of opinion, controversy was presented on the subject, we see no reason to doubt, under the facts of this case, the correctness of the rule as to the right to divide the rate, admitted by the commission and announced by the court below. This is especially the case in view of the sixth section of the act to regulate commerce, wherein it is provided that the schedules of rates to be filed by carriers shall 'state separately the terminal charges and any rules or regulations which could in anywise change, affect or determine any part of the aggregate of the aforesaid rates and fares and charges.' Whether the rule which we approve as applied to the facts in this case would be applicable to terminal services by a carrier on his own line which he was obliged to perform as a necessary incident of his contract to carry, and the performance of which was demanded of him by the shipper, is a question which does not arise on this record, and as to which we are, therefore, called upon to express no opinion." [13]

§ 702. Services after carriage is ended.

Common carriers by railroad in the United States have never followed a general custom of permitting their freight depots to be used for storage or general warehouse purposes, or of allowing their cars to be retained in the possession of shippers or consignees beyond a reasonable time for loading or unloading freight. It has been the common understanding, based upon specific rules and regulations issued by the carriers from time to time, that freight depots, cars, and sidings of carriers can only be kept in condition for the necessary reception and handling of goods in the daily course of transportation business by prompt

[13] The issues in this case have been repeatedly before the Interstate Commerce Commission. See, especially, Cattle R. A. of Texas v. Chicago, B. & Q. R. R., 10 I. C. C. Rep. 83 (1904); Same v. Same, 11 I. C. C. Rep. 277 (1905).

forwarding of freights and quickly completing delivery of transported goods to the consignees. Among the rules or regulations commonly in force upon railways and intended to effectuate the prompt shipment, carriage and delivery of freights, are the following: (a) The loading of cars furnished for shipments within 24 hours or other short specified time, under penalty of a demurrage charge for detaining the cars, which is in most cases $1.00 for each additional day or fraction thereof; and a similar regulation is applied to the unloading of cars by consignees on team tracks or private sidings. (b) The removal of goods from freight houses within a specified time, usually 24 or 48 hours, after notice of arrival to consignee, under penalty of storage at the freight house or at public warehouse and collection of additional charges therefor.

In various ways these generally described regulations are specifically stated in published freight classifications, car service rules, rate schedules, special circulars, so-called billing instructions, or bills of lading forms. They amount to conditions imposed by the carriers upon the shipment, transportation, and delivery of freight, which are not to be disregarded by shippers or consignees without incurring liability to additional expense.[14]

§ 703. Storage charges.

After transportation is at an end and the goods ready for delivery to the consignee the obligation of the common carrier ceases to a certain extent, and if the goods are left upon its hands for a time by the owners it would seem plain that having performed the services for which freight was paid it, it can make additional charges for storage of the goods with it. More than this, since to provide such storage is no part of the carrier's duty as such, it is not confined as it is in services during carriage to charge no more than the usual price for warehousing. This

[14] See Miller v. Georgia Ry. & B. Co., 88 Ga. 563, 15 S. E. 316 (1891).

was pointed out to a complainant by the Interstate Commerce Commission in the quotation which follows:[15]

"We cannot agree with the contention of the complainant in this case that the defendants had no right to charge for the storage of the freight in question more than the usual public warehouse charge in force at Macon, Georgia and Columbia, South Carolina. A railroad freight depot and a public storage warehouse are buildings whose business and uses are wholly dissimilar. The former is planned and built to accommodate the current business of the railroad when expeditiously handled, and affords no facilities for storage during long periods of time. The storage warehouse is especially designed for storage purposes. The railway company imposes storage charges, not for gain especially, but in order that it may be enabled to clear its depots to the end that current business may not be blockaded."

§ 704. Demurrage of cars.

Again, since the use of the cars at the end of the route is no part of the carrier's public undertaking, a charge for demurrage of cars is a charge distinct from the charge for carriage, and it may therefore be made as a separate charge.[16] Indeed, so entirely distinct is it from the charge for carriage that by the weight of authority no lien exists to enforce it,[17] unless of course there is an express contract permitting such a lien.

The extent of the limitations under which railroads by public announcements may make charges for demurrage of cars is well

[15] Blackman v. Southern Ry., 10 I. C. C. Rep. 350 (1904).

[16] Brown v. Grand Trunk Ry., 54 N. H. 535 (1874).

[17] Chicago & N. W. Ry. v. Jenkins, 103 Ill. 588 (1882); Cleveland, C., C. & S. L. Ry. v. Holden, 73 Ill. App. 582 (1898); Burlington & M. R. R. R. v. Chicago Lumber Co., 15 Neb. 390, 19 N. W. 451, B. & W. 290 (1884); Crommelin v. New York & H. R. R., 10 Bosw. (N. Y.) 77 (1868); East Tennessee V. & G. R. R. v. Hunt, 15 Lea (Tenn.), 261 (1885). *Contra*, Kansas Pac. Ry. v. McCann, 2 Wyo. 3 (1877).

discussed by the Court of Appeals of Kentucky [18] in the extract which follows: "Whether a charge of one dollar per day or fraction thereof, made for detention of cars and use of track on cars not unloaded within 48 hours after arrival, not including Sundays and legal holidays, and on empty cars not loaded within 48 hours after being placed, is a reasonable charge, and the time fixed for the loading and unloading, as required in the rule, is a reasonable time, are questions of fact, and on these issues the preponderance of the proof is clearly with the carriers. The rule must allow time enough to meet all cases likely to arise, and that such is the case here is abundantly shown by the testimony. That the rate of one dollar per day is also reasonable is conclusively shown. It may be somewhat more than the usual per cent. on the first cost of a car, but this is not the proper criterion. A railroad company does not construct cars for the purpose of storing property in them, and their use for transportation involves the use of costly railway tracks, and other expenditures. It may be true, as contended, that the shipper was not consulted in framing these rules. We think, however, if the rules are reasonable, this fact does not vitiate them. No complaint is made that there was an attempt to enforce them before ample notice had been given of their adoption. So, too, if the rules are reasonable, the fact there is not reciprocity of indemnity or counter penalties provided, cannot avail the appellant. If there is any principle of law well understood by shippers, it is that, for any dereliction of duty, the common carrier may be held accountable."

[18] Kentucky Wagon Manufacturing Co. v. Ohio & M. Ry., 32 S. W. 595, 17 Ky. Law Rep. 726 (1895).

PART II.

Prevention of Discrimination.

CHAPTER XXI.

GENERAL PRINCIPLES GOVERNING DISCRIMINATION.

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TOPIC A—DIFFERING THEORIES AS TO DISCRIMINATION.

§ 711. Development of the rule against discrimination.

The fundamental limitation upon the charges of a common carrier, that they shall be in no respect unreasonable, has just been discussed with much detail. But a further requirement of the public service law governing the rates of the common carrier remains to be considered, and that is the more modern requisite that rates shall be in no respect unjustly discriminatory. It must be plain to all who have followed the course of events with the least attention that there has been distinct evolution in the law governing public employment during the last twenty-five years. The rule against discrimination is the most recent development in the definition of public duty. A comparatively few years ago it was held that if a public service company served at reasonable rates it performed its obligation; but modern industrial conditions require the further law that it shall serve with equality. The double aspect in which the duty of the common carrier is making its rates is viewed by the more advanced courts is well stated by one judge thus: "The statement that one is a common carrier, *ex vi termini,* imports a duty to the public, and a corresponding legal right in the public, a right common to all. One of the duties imposed upon the common carrier is, that he is bound to carry for a reasonable remuneration, and is not allowed to make unreasonable and excessive charges. He cannot, like a merchant or mechanic, consult his pleasure or caprice in the conduct of his business, and cannot even by special agreement receive an

excessive and extortionate price for his services. Another duty imposed upon him is to make no unjust, injurious or arbitrary discriminations between individuals in his dealings with the public. The right to the transportation services of the carrier is a common right belonging to every one alike." [1]

§ 712. Early view that there was no law against discrimination as such.

The state of the law as to this matter at the middle of the nineteenth century is well set forth in the important case of Fitchburg Railroad v. Gage.[2] The principal issue in this case was whether the railroad could charge one shipper a fifty cent rate on ice from one point on their route to another while it was charging another shipper a twenty cent rate on brick for the same transportation. It will be seen that this case really involves no question of personal discrimination since these are obviously very different goods which are being shipped over the route. Still the language of the court is often cited as expressing the opinion that there is no rule against discrimination as such and this undoubtedly was their view.

Mr. Justice Merrick thus concluded his discussion of the general rights and duties of common carriers according to the common law as he conceived it to be: "The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of

[1] Per Baker, J., in St. Louis A. & T. H. Co. v. Hill, 14 Ill. App. 579 (1884).

[2] 12 Gray (Mass.), 393, B. & W. 354 (1859).

any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief. It could of course make no difference whether such a concession was in relation to articles of the same kind or belonging to the same general class as to risk and cost of transportation. The defendants do not deny that the charge made on them for the transportation of their ice was according to the rates established by the directors of the company, or assert that the compensation claimed is in any degree excessive or unreasonable. Certainly then the charges of the plaintiffs should be considered legal as well as just; nor can the defendants have any real or equitable right to insist upon any abatement or deduction, because for special reasons, which are not known and cannot therefore be appreciated, allowances may have been conceded in particular instances, or in reference to a particular series of services, to other parties." [3]

§ 713. **Later rule against unreasonable differences.**

For a considerable time thereafter this remained the prevailing statement of the extent of the limitations which the law placed upon the charges of the carrier. Indeed as new cases arose the courts committed themselves to still more definite statements. Thus in the case of Johnson v. Pensacola and Perdido Railroad Company [4] the court refused to grant reparation to a complainant who showed that while they were charging him one rate for transportation of lumber they were charging another shipper one-third less for the same transportation under circumstances and conditions in all respects that were essential entirely similar. Mr. Justice Westcott in delivering the opinion of the court held this declaration demurrable by the

[3] See §§ 716-719, *infra*, and cases cited.
[4] 16 Fla. 623, 26 Am. Rep. 731 (1878).

weight of authority. "Our conclusions," he said, "are that, as against a common or public carrier, every person has the same right; that in all cases, where his common duty controls, he cannot refuse A and accommodate B; that all, the entire public, have the right to the same *carriage at a reasonable price, and at a reasonable charge for the service performed;* that the commonness of the duty to *carry for all* does not involve a commonness or equality of compensation or charge; that all the shipper can ask of a common carrier is, *that for the service performed he shall charge no more than a reasonable sum to him;* that whether the carrier charges another more or less than the price charged a particular individual, may be a matter of evidence in determining whether a charge is too much or too little for the service performed, and that the difference between the charges cannot be the measure of damages in any case, unless it is established by proof that the smaller charge is the true reasonable charge in view of the transportation furnished, and that the higher charge is excessive to that degree." [5]

§ 714. Outright discrimination now universally condemned.

Even in so extreme a case as the one last cited some qualifications were made; the power to discriminate as much as it pleased between shippers was not left to the railroads. For even then it was vaguely felt that equal service to all dealers upon fair terms was necessary for the maintainance of free industrial conditions. And the courts never went so far that they could not be continually more insistent that they had meant that reasonable rates to all must be equal rates to all unless the conditions were shown to be disssimilar. This is the position still taken in many jurisdictions, but it will be seen that to a large extent it prevents discriminatory rates as well as unreasonable charges.

An elaborate case of the sort just described from a comparatively recent period is Cook v. Chicago, Rock Island and Pa-

[5] See §§ 720-723, *infra*, and cases cited.

cific Railway Company.[6] In that case it appeared that the plaintiffs, who were shippers of cattle, were charged by the defendant from three to ten dollars per carload of cattle shipped more than the charges made to certain favored shippers who were given a secret rebate. The court held that the railroad must make reparation for this wrong by refunding these overpayments thus extorted. The course of reasoning upon which this was done may be seen in the following extract from the opinion of Chief Justice Rothrock: "At common law a public or common carrier is bound to accept and carry for all upon being paid a reasonable compensation. The fact that the charge is less for one than another is only evidence to show that a particular charge is unreasonable. In Story on Bailments, § 508, note 3, it is said: 'There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even *gratis*.' And in 1 Wood, Railway Law, 566, it is said: 'A mere discrimination in favor of a customer is not unlawful unless it is an unjust discrimination.' In volume 2, p. 95, Redfield on Railroads, the following language is used: 'It has been held in this country, where there is no statutory regulation affecting the question, that common carriers are not absolutely bound to charge all customers the same price for the same service. But as the rule is clearly established at common law that a carrier is bound by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage, and not to extort what he will, it would seem to follow that he is bound to carry for all at the same price, unless there is some special reason for the distinction. For, unless this were so, the duty to carry for all would not be of much value to the public, since it would be easy for the carrier to select his own customers at will by the arbitrary discrimination in his favor. Hence, it was held at an early day that all that could be required on the part of the owner of the goods,

[6] 81 Ia. 551, 46 N. W. 749, 25 Am. St. Rep. 512, 9 L. R. A. 764 (1890).

by way of compensation, was that he should be ready and willing to pay a reasonable compensation, and to deposit the money in advance, if required. Carrying for reasonable compensation must imply that the same compensation is accepted always for the same service, else it could not be reasonable, either absolutely or relatively.' In Hutchinson on carriers, 243, after a review of the cases, it is said: 'Hence we may conclude that in this country, independently of statutory provisions, all common carriers will be held to the strictest impartiality in the conduct of their business, and that all privileges or preferences given to one customer, which are not extended to all, are in violation of public duty.' An examination of the authorities cited by these learned authors leaves no doubt that a common carrier has no right to make unreasonable charges for his services, and that he cannot lawfully make unjust discrimination between his customers."[7]

§ 715. All discrimination forbidden by the better view.

By the better view, it is submitted, the common law to-day forbids all discrimination between two applicants who ask the same service of a common carrier. This is the modern view reached after some bitter experiences with the results of discriminations by the railroads in disturbing the normal industrial order, in suppressing competition and fostering monopoly. But over thirty years ago this doctrine that there is a necessary common law rule against discrimination involved in the law defining the public duty of the common carrier was stated in a way which has never been improved upon. In the leading case of Messenger v. Pennsylvania Railroad Company[8] Mr. Justice Beasley said in part: "Recognizing this as the settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions. Such par-

[7] See §§ 731-736, *infra*, and cases cited.

[8] 7 Vroom (36 N. J. Law) 407, 13 Am. Rep. 437, B. & W. 357 (1872).

tiality is legitimate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge, is undoubtedly bound to exercise such office for the equal benefit of all, and therefore to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. If he exacts different rates for the carriage of goods of the same kind, between the same points, he violates, as plainly, though it may be not in the same degree, the principle of public policy which, in his own despite, converts his business into a public employment. The law that forbids him to make any discrimination in favor of the goods of A over the goods of B, when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. I can see no reason why, under legal rules, perfect equality to all persons should be exacted in the dealings of the common carrier, except with regard to the amount of compensation for his services. The rules that the carrier shall receive all the goods tendered loses half its value, as a politic regulation, if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of others. Nor would this defect in the law, if it existed, be remedied by the principle which compels the carrier to take a reasonable hire for his labor, because, if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another for similar services, he disturbs that equality of rights among his employers which it is the endeavor of the law to effect."[9]

[9] See §§ 724-730, *infra*, and cases cited.

TOPIC B—VIEW THAT NO RULE AGAINST DISCRIMINATION AS SUCH.

§ 716. Extension of the rule against unreasonable rates.

As a practitioner must deal with conditions as they are, it must be recognized that in many jurisdictions there is no general principle recognized by the courts against discrimination as such. On the other hand, it can be said that the courts in these jurisdictions have stretched the requirement for reasonable charges so far that it will give protection in most instances of unjust discrimination. Some prominent cases in support of these propositions are cited in the sections which follow. It will be seen in these cases that the pressure of the growing public demand that discrimination shall be stopped has been felt by the courts, and that in those jurisdictions where the language in the earlier cases was too positive to be explained away, the most that it was possible to do was done in extending the rules to meet modern conditions.[1]

[1] The principal cases which have held that there is no rule against discrimination as such are collected in this note for the convenience of the reader:

United States—Parsons v. Chicago & N. W. Ry., 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887 (1897) (semble); De Bary Baya M. L. v. Jacksonville, T. & K. W. R. R., 40 Fed. 392 (1889).

California—Cowden v. Pacific C. S. S. Co., 94 Cal. 470, 29 Pac. 873, 28 Am. St. Rep. 142, 18 L. R. A. 221 (1892).

Colorado—Bayles v. Kansas Pac. R. R., 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480 (1894).

Florida—Johnson v. Pensacola & P. R. R., 16 Fla. 623, 26 Am. Rep. 731 (1878).

Illinois—Chicago, B. & Q. R. R. Co. v. Parks, 18 Ill. 464, 68 Am. Dec. 562 (1856); Indianapolis, etc., R. R. v. Davis, 32 Ill. App. 67 (1889) (semble).

Iowa—Cook v. Chicago, R. I. & Pac. Ry. Co., 81 Ia. 551, 46 N. W. 749, 25 Am. St. Rep. 512, 9 L. R. A. 764 (1890), (semble).

Massachusetts—Fitchburg R. R. v. Gage, 12 Gray, 393, B. & W. 354 (1859).

Missouri—Christie v. Missouri P. R. R., 94 Mo. 453, 7 S. W. 567 (1888), (semble).

§ 717. **No rule against discrimination as such.**

It has already been pointed out that up to twenty-five years ago the prevalent doctrine was that there was no rule against discrimination as such unless it was shown that the higher charge was unreasonable. One of the frankest cases in making that distinction was *Ex parte* Benson & Co.,[2] where the court permitted the recovery of a rebate promised to certain shippers to induce them to ship by rail rather than by river. The language of Chief Justice Simpson leaves no doubt as to his belief: "The extent of the common law rule seems to be, not that carriers shall transport for all parties at the same rate of compensation, otherwise their contracts are illegal and void, but that they shall transport at reasonable rates to all. A difference in the charge does not *per se* invalidate the contracts as inequitable and against public policy; but to have this effect, there must be an element of unreasonableness in the charge itself, as applied to the services rendered, between the parties to the contract and without comparison to the charges against others. Independent of statutes and provisions in their charters restricting corporations within

New Hampshire—McDuffee v. Portland & R. R. R., 52 N. H. 430, 13 Am. Rep. 72, B. & W. 149 (1873); Concord & P. R. R. v. Forsaith, 59 N. H. 122, 47 Am. Rep. 181 (1879).

New York—Killmer v. New York C. R. R., 100 N. Y. 395, 3 N. E. 293, 53 Am. Rep. 194 (1885); Root v. Long I. R. R., 114 N. Y. 300, 21 N. E. 403, 11 Am. St. Rep. 643, 4 L. R. A. 331, B. & W. 377 (1889); Lough v. Outerbridge, 143 N. Y. 271, 28 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674, B. & W. 380; Parks v. Jacob Dold Packing Co., 6 Misc. 570, 27 N. Y. Supp. 289 (1894).

Pennsylvania—Audenried v. Philadelphia & R. R. R., 68 Pa. St. 370, 8 Am. Rep. 195 (1871), (semble).

South Carolina—*Ex parte* Benson & Co., 18 S. C. 38, 44 Am. Rep. 564 (1882); Avinger v. So. Car. R. R., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716 (1888).

Tennessee—Ragan & Buffet v. Aiken, 9 Lea (77 Tenn.), 609 (1882).

Texas—Houston & T. C. Ry. v. Rust & Dinkins, 58 Tex. 98 (1882).

England—Nicholson v. Gt. Western R. R., 5 C. B. N. S. 366 (1858); Stone v. Midland Ry. (1903), 1 K. B. 741 (semble).

[2] 18 S. C. 38, 44 Am. Rep. 564 (1882).

certain limits, they stand in the community as other individuals invested with the power to contract and be contracted with, and the validity of their contracts depends upon the same principles which govern contracts between natural persons. It is too vague to say, in general terms, that the contract is inequitable and against public policy, and, therefore, not enforceable. To be void on such grounds, it must run contra to some known principle of equity or contravene some well-established doctrine of public policy forbidding it." [3]

§ 718. **Discrimination as evidence of unreasonable rates.**

In an outrageous case the principles discussed in these cases will usually be found to give relief. Thus where one shipper was "blacklisted" by a common carrier and subjected to unreasonable discriminations, including being charged more than usual rates, because he maintained business relations with a rival carrier,[4] the court issued an injunction, Judge Baxter saying: "Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with ab-

[3] Of the cases cited in the preceding section see, especially, the following for their definite language:

California—Cowden v. Pacific C. S. S. Co., 94 Cal. 470, 29 Pac. 873, 28 Am. St. Rep. 142, 18 L. R. A. 221 (1892).

Florida—Johnson v. Pensacola & P. R. R., 16 Fla. 623, 26 Am. Rep. 731 (1878).

Massachusetts—Fitchburg R. R. v. Gage, 12 Gray, 393, B. & W. 354 (1859).

New Hampshire—Concord & P. R. R. v. Forsaith, 59 N. H. 122, 47 Am. Rep. 181 (1879).

New York—Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674, B. & W. 380 (1894); Langdon v. N. Y., L. E. & W. R. R., 9 N. Y. Supp. 245 (1890).

South Carolina—Ex parte Benson & Co., 18 S. C. 38, 44 Am. Rep. 564 (1882).

Texas—Houston & T. C. Ry. v. Rust & Dinkins, 58 Tex. 98 (1882).

[4] Menacho v. Ward, 27 Fed. 529, B. & W. 372 (1886).

solute equality. It is his privilege to charge less than fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carriers on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public.[5] In the present case the question whether the defendants refuse to carry for the complainants at a reasonable compensation resolves itself into another form. Can the defendants lawfully require the complainants to pay more for carrying the same kind of merchandise, under like conditions, to the same places, than they charge to others, because the complainants refuse to patronize the defendants exclusively, while other shippers do not? The fact that the carrier charges some less than others for the same service is merely evidence for the latter, tending to show that he charges them too much; but when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence, and shifts upon him the burden of justifying the exceptional charge. The estimate placed by a party upon the value of his own services of property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public." [6]

[5] Citing Fitchburg R. Co. v. Gage, 12 Gray, 393, B. & W. 354 (1859), *inter alia*.

[6] Discrimination was held evidence of unreasonable rates in the following cases, among others:

United States—Union Pac. Ry. Co. v. Goodridge, 149 U. S. 680, 37 L. Ed. 986, 13 Sup. Ct. 970 (1893); Parsons v. Chicago & N. W. Ry., 167

§ 719. Special concessions may be made from established rates.

Even in some comparatively recent cases these general doctrines are stated in much the same language as formerly. Thus in Lough v. Outerbridge,[7] in holding that a common carrier might grant special reductions in pursuance of a policy to maintain its business in the face of competition, the court held that those who would not conform to the conditions had no complaint if they were not given the reduced rates. The court thus stated the general principles governing the situation as it conceived them to be. "There can be no doubt that the carrier could at common law make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases, for special reasons, and upon special conditions, without violating any of the duties or obligations to the public inherent in the employment. If the general rates are reasonable, a devia-

U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887 (1897); Hays v. Pennsylvania Co., 12 Fed. 309, B. & W. 368 (1882); Menacho v. Ward, 27 Fed. 529, B. & W. 372 (1886); Missouri Pac. R. R. v. Texas & Pac. R. R., 30 Fed. 2 (1887); Burlington C. R. & N. Ry. v. N. W. Fuel Co., 31 Fed. 652 (1887).

Alabama—Mobile & O. R. R. v. Dismuker, 94 Ala. 135, 17 L. R. A. 113 (1891); Mobile v. Bienville Water S. Co., 130 Ala. 379, 30 So. 445, B. & W. 417 (1901).

Colorado—Bayles v. Kansas Pac. R. R., 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480 (1889).

Illinois—St. Louis, A. & T. H. R. R. v. Hill, 14 Ill. App. 579 (1884).

Indiana—Louisville, E. & St. L. Con. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311 (1892).

Iowa—Cook v. Chicago, R. I. & P. Ry. Co., 81 Iowa, 551, 46 N. W. 749, 25 Am. St. Rep. 512, 9 L. R. A. 764 (1890).

Missouri—Christie v. Missouri P. R. R., 94 Mo. 453, 7 S. W. 567 (1888).

New Hampshire—McDuffee v. Portland & R. R. R., 52 N. H. 430, 13 Am. Rep. 72, B. & W. 149 (1873).

New York—Root v. Long I. R. R., 114 N. Y. 300, 21 N. E. 403, 11 Am. St. Rep. 643, 4 L. R. A. 33, B. & W. 377 (1889).

[7] 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674, B. & W. 380 (1894).

tion from the standard by the carrier in favor of particular customers, for special reasons not applicable to the whole public, does not furnish to parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical, the charges to all shippers for the same service must be equal. These principles are well settled, and whatever may be found to the contrary in the cases cited by the learned counsel for the plaintiff originated in the application of statutory regulations in other States and countries.[8] Special favors in the form of reduced rates to particular customers may form an element in the inquiry whether, as matter of fact, the standard rates are reasonable or otherwise. If they are extended to such persons at the expense of the general public, the fact must be taken into account in ascertaining whether a given tariff of general prices is or is not reasonable. But as in this case the reasonable nature of the price for which the defendants offered to carry the plaintiff's goods has been settled by the findings of the trial court, it will not be profitable to consider further the propriety or effect of such discrimination."[9]

[8] Railroad Co. v. Gage, 12 Gray, 393, B. & W. 354 (1859); Sargent v. Railroad Co., 115 Mass. 422 (1874); Steamship Co. v. McGregor, 21 Q. B. Div. 544, affirmed 23 Q. B. Div. 598, and by H. L. 17 App. Cas. 25 (1892); Evershed v. Railway Co., 3 Q. B. Div. 135, affirmed L. R. 3 App. Cas. 1029 (1878).

[9] See, also:

United States—Hays v. Pennsylvania Co., 12 Fed. 309, B. & W. 368 (1882).

Florida—Johnson v. Pensacola & P. R. R., 16 Fla. 623, 26 Am. St. Rep. 731 (1878).

Illinois—Chicago, B. & Q. R. R. v. Parks, 18 Ill. 464, 68 Am. Dec. 562 (1856).

Missouri—Rothschild v. Wabash, St. L. & P. R. R., 92 Mo. 91, 4 S. W. 418 (1887).

New York—Killmer v. New York C. R. R., 100 N. Y. 395, 3 N. E. 293, 53 Am. Rep. 194 (1885).

Pennsylvania—Com. v. Delaware & H. C. Co., 45 Pa. St. 295, B. & W. 405 (1862).

§ 720. **Outright discrimination unreasonable.**

It will be noted that in none of these cases is the possibility of giving legal redress for outright discrimination quite cut off. That it is not impossible to hold the views herein expressed and yet find simple discrimination illegal is shown by the opinion of Chief Justice Doe in McDuffee v. Portland and Rochester Railroad,[10] an important case, elsewhere discussed fully. He said in part:

"The commonness of the right necessarily implies an equality of right, in the sense of freedom from unreasonable discrimination; and any practical invasion of the common right by an unreasonable discrimination practised by a carrier held to the common service is insubordination and mutiny, for which he is liable to the extent of the damage inflicted, in an action of case at common law. The question of reasonableness of price may be something more than the question of actual cost and value of service. If the actual value of certain transportation of one hundred barrels of flour, affording a reasonable profit to the carrier, is one hundred dollars; if, all the circumstances that ought to be considered being taken into account, that sum is the price which ought to be charged for that particular service; and if the carrier charges everybody that price for that service, there is no encroachment on the common right. But if for that service the carrier charges one flour merchant one hundred dollars, and another fifty dollars, the common right is as manifestly violated as if the latter were charged one hundred dollars and the former two hundred. What kind of a common right of carriage would that be which the carrier could so administer as to unreasonably, capriciously, and despotically enrich one man and ruin another? If the service or price is unreasonable and injurious, the unreasonableness is equally actionable, whether it is in inequality or in some other particular. A service or price that would otherwise be reasonable may be made unreasonable by an unreason-

[10] 52 N. H. 430, 13 Am. Rep. 72, B. & W. 149 (1873).

able discrimination, because such a discrimination is a violation of the common right." [11]

§ 721. Undue preferences forbidden.

In Bayles v. Kansas Pacific Railroad Company,[12] the question came before the court in this form, whether a rebate promised to the shipper by the railroad in a transportation contract could be recovered by him in a suit at law. As it did not appear that the special through rate in this case was not offered to other shippers, it may well be that the demurrer to this complaint claiming that the transaction was against public policy was properly overruled. But the court—Pattison, J., writing the opinion—took occasion to say: "It is a well settled elementary principle of the law of common carriers that mere inequalities in charges do not amount to unjust discrimination. The requirement of the law is that the charge made shall be reasonable. A claim against a common carrier cannot be predicated upon the bare fact that the amount paid by one is greater than the amount paid by another. At common law, the question is whether, under all the circumstances, the charge is reasonable. Complete uniformity in charges is not obligatory. This principle prevails in all the States except where it has been modified by legislative enactment. In the administration of the law the principle itself has never been modified, but the courts have declared in many cases that there must be no unjust discrimination. This, too, has come to be an elementary principle. Charges, therefore, must not only be reasonable, but equal, when the circumstances

[11] See, also:

United States—Wight v. United States, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. 822 (1897); Griesser v. McIlrath, 13 Fed. 373 (1882); Samuels v. Louisville & N. R. R., 31 Fed. 57 (1887); United States v. Howell, 56 Fed. 21 (1892); Re Charge to Grand Jury, 66 Fed. 146 (1895); United States v. De Cousey, 82 Fed. 302 (1897).

New York—Parks v. Jacob Dold Packing Co., 6 Misc. (N. Y.) 570, 27 N. Y. Supp. 289 (1894).

[12] 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480 (1889).

and conditions are the same. Privileges tending to give to a shipper monopoly, which may injuriously affect those engaged in like pursuit, are declared to be unjust. Contracts which tend to create such preference are held to be void as against public policy." [13]

§ 722. Special rates may not be discriminatory.

In the case of Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company v. Closser,[14] where suit was brought for a rebate promised by the railroad upon a special arrangement for a through shipment of grain, no other facts appearing, it was held that where a carrier agrees that he will carry goods at a certain rate and that after the shipment he will repay the shipper a rebate of part of such rate, this is only an agreement to carry the goods at a compensation ultimately agreed upon, and is not illegal in itself. The general attitude of the court may be seen from the following extract from the opinion of Mr. Justice Elliott, in which he states the extent of the law against discrimination as the Indiana court sees it. "It is by no means every favor shown a particular shipper, although it may constitute in some measure a discrimination favorable to him and unfavorable to other shippers that impresses upon a contract for the carriage of goods the seal of condemnation. The common-law authorities fully support the position here taken that reference always must be had to such circumstances as quantity, distance and kindred considerations. The hinge of the question is not found

[13] See, also, Hays v. Pennsylvania Co., 12 Fed. 309, B. & W. 368 (1882); Burlington, C. R. & N. Ry. v. N. W. Fuel Co., 31 Fed. 652 (1887); Tift v. Southern Ry., 123 Fed. 789 (1903); Interstate Com. Com. v. Southern Pac. Ry., 132 Fed. 829 (1904); People v. Chicago & A. R. R., 67 Ill. 118 (1873); Savity v. Ohio & M. Ry., 150 Ill. 208, 37 N. E. 235, 27 L. R. A. 626 (1894), affirming s. c. 49 Ill. App. 315; St. Louis, A. & T. H. R. R. v. Hill, 14 Ill. App. 579 (1884).

[14] 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754 (1890).

in the single fact of discrimination, for discrimination without partiality is inoffensive and partially exists only in cases where advantages are equal and one party is unduly favored at the expense of another who stands upon an equal footing."

§ 723. **Exclusiveness of the privilege creates discrimination.** In a similarly inconclusive case, Christie v. Missouri Pacific Railroad Company,[15] where a petition alleged that a contract was made with the agent of a railroad company regarding the shipment of grain at a reduced price, stating its terms, it was held that nothing appeared to show that the arrangement was against public policy, Chief Justice Norton saying: "A common carrier has the right to contract to ship freight at a lower rate than the published tariff rate, if he choose to do so; and such a contract is not against public policy unless the privilege to ship at such rate is granted exclusively to the shipper with whom it is made, or is denied to other shippers. It is the exclusiveness of the privilege granted to one and denied to another which makes the discrimination, and renders the contract void as against public policy. No such exclusiveness or discrimination appears in the contract sued upon, and the objection of defendant to the reception of any evidence was properly overruled." [16]

TOPIC C—VIEW THAT DISCRIMINATION ILLEGAL IN ITSELF.

§ 724. **Necessity for the rule against discrimination.** By the modern way of looking at this matter, however, discrimination is illegal. In last analysis it is public opinion which has dictated this rule, although it is not too much to claim that this rule is a logical development in the law of public duty. So

[15] 94 Mo. 453, 7 S. W. 567 (1888).

[16] The case of Toledo, W. & W. R. Co. v. Elliott, 76 Ill. 67 (1875), was relied upon by the court.

involved are the services of the common carrier, directly or indirectly in all modern businesses that it is already felt to be unbearable if transportation is not open to all upon equal terms. And the rule must be exact. It is not enough to say that all must be given rates which are not unreasonable, for by that principle in many cases unequal rates might be justified. What public opinion requires to-day is that the rates shall be equal; if they are different by a few cents upon a hundred weight it may mean the fortune of the shipper who gets the lower rate, and the ruin of his competitor who pays the higher rate. The cases requiring the same rate to shippers who ask for the same transportation of the same goods at the same time and under the same conditions may seem fewer in number than those which are more conservative. But this principle was made law in many States by an impatient public who demanded statutes so that there could be in the future no equivocations, before many courts had time to express their opinion and before other courts had time to recant. And upon the whole it is claimed with confidence that outright personal discrimination is opposed to modern common law principles.[1]

[1] The following cases hold discrimination in rates to be illegal in itself if the conditions are similar:

UNITED STATES—Wight v. United States, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. 822 (1897); Western U. T. Co. v. Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561 (1901), overruling s. c. 44 Neb. 326, 62 N. W. 506 (1895); Hays v. Pennsylvania Co., 12 Fed. 309, B. & W. 368 (1882); Griesser v. McHeath, 13 Fed. 373 (1882); Burlington, C. R. & W. Ry. v. N. W. Fuel Co., 31 Fed. 652 (1887); Handy et al. v. Cleveland & M. R. Co. et al., 31 Fed. 689 (1888).

Alabama—Mobile & O. R. R. v. Dismuker, 94 Ala. 135, 17 L. R. A. 113 (1891); Mobile v. Bienville Water S. Co., 130 Ala. 379, 30 So. 445, B. & W. 417 (1901).

Georgia—Savannah, F. & W. Ry. v. Burdick, 94 Ga. 775, 21 S. E. 994 (1894).

Illinois—Chicago & A. R. R. v. People, 67 Ill. 16, 16 Am. Rep. 599 (1873); People v. Chicago & A. R. R., 67 Ill. 118 (1873); Chicago & A. R. R. Co. v. Coal Co., 79 Ill. 121 (1875); Indianapolis, D. & S. R. R. v. Ervin, 118 Ill. 250, 8 N. E. 862 (1886).

§ 725. **Evils of discriminations between competitors.**

The leading case in American law which first established upon a firm foundation the rule forbidding discrimination in the modern sense of that term was Messenger v. Pennsylvania Railroad Company.[2] The facts in that case were in brief that the Pennsylvania Railroad Company, who were the defendants in this action, agreed with the plaintiffs to carry certain merchandise for them, between certain termini, at a fixed rate less than they should carry between the same points for any other person. The allegation was that goods had been carried for other parties at a certain rate below what the goods of the plaintiffs had been carried, and this suit was to enforce the foregoing stipulation. The question was whether the agreement thus forming the foundation of the suit was legal. In the Supreme Court of New Jersey an excellent opinion was written by Chief Justice Beasley pointing out that such an agreement was against public policy. This was affirmed by the Court of Errors and Appeals, Mr. Justice Biddle writing an elaborate opinion, in the course of which he said:

New Jersey—Messenger v. Pennsylvania R. R., 7 Vroom (36 N. J. L.), 407, 13 Am. Rep. 457, 8 Vroom (37 N. J. L.), 531, 18 Am. Rep. 754, B. & W. 357 (1874); Steward v. Lehigh V. R. R., 38 N. J. L. 505 (1875).

North Carolina—Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240, B. & W. 403 (1898).

Ohio—Scofield v. Lake Shore & M. S. R. R., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846 (1885); State v. Cincinnati, N. O. & T. P. Ry., 47 Ohio St. 130, 23 N. E. 928, B. & W. 400 (1890); Brundred v. Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589 (1892); Baltimore & O. R. R. Co. v. Diamond Coal Co., 61 Ohio St. 242, 55 N. E. 616 (1899).

Pennsylvania—Sandford v. Catawissa, W. & E. R. R., 24 Pa. St. 378, 64 Am. Dec. 667 (1855); Twells v. Pa. Ry., 2 Watts, 450, 3 Am. L. Reg. N. S. 728 (1863); Chamblos v. Philadelphia & R. R. R., 4 Brews. (Pa.) 563 (1873).

Texas—Dittmar v. New Braunfels, 20 Tex. Civ. App. 293, B. & W. 388 (1899).

Vermont—Fitzgerald v. Grand Trunk Ry., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70 (1891).

[2] 7 Vroom (36 N. J. Law), 407, 13 Am. Rep. 457, 8 Vroom (37 N. J. L.), 531, 18 Am. Rep. 754, B. & W. 357 (1874).

"A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust, when the right to demand it is common. It would be strange if, when the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate, that by the indirect means of unequal prices some could lawfully get the advantage of the accommodation and others not. A direct refusal to carry for a reasonable rate would involve the carrier in damages, and a refusal, in effect, could be accomplished by unfair and unequal charges, or if not to that extent, the public right to the convenience and usefulness of the means of carriage could be greatly impaired. Besides, the injury is not only to the individual affected, but it reaches out, disturbing trade most seriously. Competition in trade is encouraged by the law, and to allow any one to use means established and intended for the public good, to promote unfair advantages amongst the people and foster monopolies, is against public policy, and should not be permitted." [3]

[3] The language in the following cases is especially strong against personal discrimination:

United States—Menacho v. Ward, 27 Fed. 529, B. & W. 372 (1886); Samuels v. Louisville & N. R. R., 31 Fed. 57 (1887).

Alabama—Mobile & Bienville Water S. Co., 130 Ala. 379, 30 So. 445, B. & W. 417 (1901).

Illinois—Chicago & A. R. R. v. People, 67 Ill. 16, 16 Am. Rep. 599 (1873).

New Jersey—Messenger v. Pennsylvania R. R., 7 Vroom (36 N. J. L.), 407, 13 Am. Rep. 457, 8 Vroom (37 N. J. L.), 531, B. & W. 357 (1874).

North Carolina—Griffin v. Goldsboro Water Co., 112 N. C. 206, 30 S. E. 319, 41 L. R. A. 240, B. & W. 403 (1898).

Ohio—Scofield v. Lake Shore & M. S. R. R., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846 (1885).

Vermont—Fitzgerald v. Grand Trunk Ry., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70 (1891).

§ 726. **Discriminations foster monopolies.**

The other leading case against personal discrimination is Schofield v. Lake Shore & Michigan Southern Railway Company.[4] In that case it appeared that the railway company, having tariff rates for the public generally, contracted with the Standard Oil Company that, in consideration of said company giving to the railway its entire freight business in the products of petroleum, they would transport such freight for the company at certain rates, about ten cents per barrel cheaper than for any other customers whatsoever. Plaintiffs, one Schofield and others, being also engaged in the manufacture and also dealers in refined and other products of petroleum, offered their products to the railway company for shipment on the same terms granted to the Standard Oil Company, and, on being refused shipment on the terms, brought their bill to enjoin the railway company from charging and collecting from them, for freight on said line, rates and amounts in excess of those charged to the Standard Company for like goods to the same points, or from discriminating against them in favor of the Standard Company. The prayer of the bill was granted in an elaborate opinion, the tenor of which may be judged from the following paragraph: "The district court, in their finding 10 1-2, state that shipment by the carload was the manner in which nearly all the business was done. That on the request of either party to furnish cars, the defendant had them switched to the refineries, and after being loaded were switched back and placed on the defendant's tracks for shipment on its own road. The manner of making shipments for plaintiffs and for the Standard Oil Company was precisely the same, and the only thing to distinguish the business of the one from the other was the aggregate yearly amounts of freight shipped. We adopt the reasoning of Baxter, J., as the better law, and hold that a discrimination in the rate of freights resting exclusively on such a basis ought not to be sustained.

[4] 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846 (1885).

The principle is opposed to a sound public policy. It would build and foster monopolies, add largely to the accumulated power of capital and money, and drive out all enterprise not backed by overshadowing wealth. With the doctrine as contended for by the defendant, recognized and enforced by the courts, what will prevent the great grain interests of the northwest, or the coal and iron interests of Pennsylvania, or any of the great commercial interests of the country, bound together by the power and influence of aggregate wealth, and in league with the railroads of the land, driving to the wall all private enterprises struggling for existence, and with an iron hand thrusting back all but themselves?" [5]

§ 727. Rule forbidding discrimination goes beyond rule requiring reasonable rates.

It is submitted that for the reasons advanced in these last two cases, if for no other reasons, it is a necessary part of the common law governing common carriers that they must not discriminate between shippers; and it must be plain that this involves the recognition of a rule forbidding discrimination which goes beyond the prior rule requiring reasonable charges. It was not

[5] This point that discriminations foster monopolies was especially emphasized in:

United States—Samuels v. Louisville & N. R. R., 31 Fed. 57 (1887).

Maine—New England Exp. Co. v. Maine C. R. R., 57 Me. 188, 2 Am. Rep. 31 (1869).

New Hampshire—McDuffee v. Portland & R. R. R., 52 N. H. 430, 13 Am. Rep. 72, B. & W. 149 (1873).

New Jersey—Messenger v. Pennsylvania R. R., 7 Vroom (36 N. J. L.), 407, 13 Am. Rep. 457, 8 Vroom (37 N. J. L.), 531, 18 Am. Rep. 754, B. & W. 357 (1874).

Ohio—Scofield v. Lake Shore & M. S. R. R., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846 (1885).

Pennsylvania—Sandford v. Catawissa, W. & E. R. R., 24 Pa. St. 378, 64 Am. Dec. 667 (1855).

Vermont—Fitzgerald v. Grand Trunk Ry., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70 (1891).

easy to work this out logically, since it did involve a development in the law governing public service. How cautious many courts were in working the new rule out may be seen by an extract from the opinion of Judge Bruce in Samuels v. Louisville and Nashville Railroad Company,[6] where the court sustained on demurrer a complaint which stated discrimination, but did not allege unreasonable charge: "But the question in this case is to be determined upon the common law, and in the light of those principles as applied to railroad companies. In a case like the one at bar, can there be a reasonable charge which is not at the same time a substantially equal charge? And is not a charge unreasonable when it is unequal, and in breach of the obligation and duty of the common carrier to the public?" [8]

§ 728. **Public injury by discriminations in freight rates.**

The argument from policy against discrimination is so plain to any one who has not been out of touch with the recent developments in the industrial situation that it is hardly necessary to elaborate it. But a succinct statement from a recent decision by Judge Grosscup,[9] where he held that under its general chancery jurisdiction, a court of equity has power to remedy wrongs consisting of the violation by a carrier of the provisions of the interstate commerce law prohibiting discrimination between shippers, brings out well the necessity for the protection of the whole public in having the benefits of an open market. "The bill avers—and this hearing is upon demurrer and motion for an injunction—that such discrimination was practiced in the transportation of grains and of packing house goods; and that in the transportation of grain it had gone so far that each railroad

[6] 31 Fed. 57 (1887).

[8] The cases holding that the rule against discrimination in rates goes beyond the rule requiring reasonableness in rates are collected in the footnotes to § 724, *supra*.

[9] United States v. Michigan Central R. R., 122 Fed. 544 (1903).

reaching into the grain districts had eliminated all competitive dealers, leaving only a single favored dealer who purchased all the grain at all the stations along the lines of the roads. Of course under such conditions, the grain grower was deprived of the benefit of competition among dealers. The practical effect was the same as if the railroads had established agencies of their own to purchase the grain, and by giving these discriminatory advantages, had excluded all other grain purchasers from the field. Such a policy necessarily destroys the competition to which the grain growers in a given district are entitled. Discrimination of this character is, of course, contrary to the plain provisions of the interstate commerce act."

§ 729. Public wrong in giving free passes to passengers.

These general principles against personal discrimination should, of course, apply to transportation of passengers as well as to transportation of goods. Dissimilarity of circumstances will justify differences in passenger rates as well as differences in freight rates, but outright discrimination between passengers asking the same service under the same conditions is as odious as personal discrimination between shippers who ask the same service. To quote the language of Commissioner Knapp in Harvey v. Louisville and Nashville Railroad Company:[10] " The fundamental and pervading purpose of the law is equality of treatment. It assumes that the railroads are engaged in a public service, and requires that service to be impartially rendered. It asserts the right of every citizen to use the agencies which the carrier provides on equal terms with all his fellows, and finds an invasion of that right in every unauthorized exemption from charges commonly imposed. No form of favoritism and no species of partiality seems more odious or indefensible than that which accords to personal influence or public station privileges not enjoyed by the community at large. The free carriage of

[10] 5 I. C. C. Rep. 153 (1892).

certain persons merely because they occupy official positions, or have acquired some measure of distinction, offends the rudest conception of equality, and contravenes alike the policy and the provisions of the statute. The practices complained of in this proceeding are illegal, and must receive our condemnation."

§ 730. **Giving free passes prima facie discrimination.**

It was formerly customary to give free passes very freely to the families and acquaintances of those connected with the railroad management, and also to various gentlemen whose claim for the privilege of free transportation was based upon the fact that they were long eminent in the public service, higher officers of the States, prominent officials of the United States, members of legislative railroad committees, and persons whose good will was claimed to be important to the railroad. Within the last few years the statute law and the interpretation of it based upon common law principles has become increasingly opposed to the issue of such passes. The temper of the courts under the new regime may be judged from the following language, often cited, used in a charge to the Grand Jury [11] by Morrow, District Judge, when he said squarely: "In other words, one of the objects of Congerss in this character of legislation was to do away with the pernicious practice of unjust discriminations in rates, and to break up the odious system of favoritism and special privileges, so contrary to the principles of our government, of which one of the fundamental ideas is that all men are equal in the eyes of the law, and should be so treated. It was designed by the act referred to, to compel common carriers of interstate commerce to discharge their public function impartially in charging for transportation; treating everybody alike, so far as that is practicable, whether in high or low station, whether public functionary or private citizen, whether rich or poor."

[11] 66 Fed. 146 (1895).

TOPIC D—WHAT CONSTITUTES DISCRIMINATION.

§ 731. Not all differences are discriminatory.

In this topic it is proposed to discuss in a preliminary way, what is developed at much length in the following chapters, the tests by which it may be determined whether a difference in rates made to different shippers of somewhat similar articles offered under somewhat similar circumstances is discrimination such as the law forbids. The cases selected illustrating the various phases of the problem are: first, those in which the services performed are substantially identical, but the position of the applicants different, and second, those in which the services asked are essentially dissimilar but the condition of the applicants the same. These possibilities in the general problem are thus stated by the Supreme Court of the United States:[1] "No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate commerce or in that wholly within the State, are performing a public service. They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this all individuals have equal rights, both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast-iron rule of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charges which is not based upon difference of service, and it must have some reasonable relation to the amount of difference and cannot be so great as to produce an unjust discrimination."[2]

[1] Western U. T. Co. v. Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561 (1901), overruling s. c. 44 Neb. 326, 62 N. W. 506 (1895).

[2] The various differences in the conditions under which services are

§ 732. Whether the rule is limited to discrimination between competitors.

What the law against discrimination was chiefly developed to meet was discrimination between shippers who were competitors in business. This has already been seen from the language of many judges whose opinions have been quoted; but few of these judges limited the operation of this rule against discrimination to those cases in which the discrimination was between competitors, for almost all of them relied upon the legal argument that the common right of all involved the duty to give equal rates to all. A typical case in which the reasoning covers the whole field is Fitzgerald v. Grand Trunk Railway Company,[3] where Mr. Justice Powers in holding an agreement to give a rebate illegal said:[4] "At common law, common carriers were held to be persons who exercised their calling for the public good, upon equal terms, and with the same facilities to all their customers. They could not lawfully exercise their calling by granting advantages to one customer which they denied to another, but were held to the duty of serving all alike. Their call-

rendered which justify differences in rates are discussed in Chapter XXIII, *infra*. It is sufficient at this point to cite the following leading cases: Interstate Com. Com. v. B. & O. R. R., 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844 (1892); Lotspeich v. Central Ry. & B. Co., 73 Ala. 306 (1882); Savitz v. Ohio & M. Ry., 150 Ill. 208, 27 N. E. 235, 27 L. R. A. 626 (1894), affirming 49 Ill. App. 315; Rothschild v. Wabash, St. L. & P. R. R., 92 Mo. 91, 4 S. W. 418 (1887); Root v. Long I. R. R., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. Rep. 643, B. & W. 377 (1889); State v. Cincinnati, N. O. & T. P. Ry., 47 Ohio St. 130, 23 N. E. 928, B. & W. 400 (1890); Hoover v. Pennsylvania R. R., 156 Pa. St. 200, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263, B. & W. 419 (1893).

[3] 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70 (1891).

[4] Citing Messenger v. Pennsylvania R. Co., 7 Vroom (36 N. J. L.), 407, 13 Am. Rep. 457, 8 Vroom (37 N. J. L.), 531, 18 Am. Rep. 754, B. & W. 357 (1874). See, also, Audenried v. Philadelphia & R. R. Co., 68 Pa. 370, 8 Am. Rep. 195 (1871); McDuffee v. Portland & R. R. Co., 52 N. H. 430, 13 Am. Rep. 72, B. & W. 149 (1873); New England Exp. Co. v. Maine Cent. R. Co., 57 Me. 188, 2 Am. Rep. 31 (1869).

ing is one public in its nature, and the common law exacted of them a strict impartiality in their dealings with the public. If the plaintiffs could transport their lumber to market for $6 per carload less than their neighbors, they would very soon have a monopoly of the business. Many cases might be cited to show that, at common law, all such special terms and favoritism are illegal." [5]

§ 733. Whether reductions can be made for benevolent purposes.

The argument has been made in several cases, most of them early cases, that it could not be contrary to law for the carrier to make occasional concessions in particular cases, as no harm of any considerable sort would be done to others by the granting of such special favors. The example usually given of such occasional favors is that the railroad might carry for charity in particular instances. If this be so, it must according to modern ideas be subject to the most strict limitations; but probably the cautious opinion expressed by Chief Justice Doe in one of his great cases [6] remains accepted law: "This question may be made unnecessarily difficult by an indefiniteness, confusion, and obscurity of ideas that may arise when the public duty of a common carrier, and the correlative common right to his reasonable service for a reasonable price, are not clearly and broadly dis-

[5] The following cases may be classified as cases in which the shippers who were given different rates were not competitors with each other, a fact which influenced the courts in not holding the differences illegal: Louisville & N. R. R. v. Fulgham, 91 Ala. 555, 8 So. 803 (1890); Bayles v. Kan. Pac. R. R., 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480 (1889); Johnson v. Pensacola & P. R. R., 16 Fla. 623, 26 Am. Rep. 731 (1878); Louisville, E. & St. L. C. R. R. v. Crown Coal Co., 43 Ill. App. 228 (1891); Hoover v. Pennsylvania R. R., 156 Pa. St. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263, B. & W. 410 (1893); Ragan & Buffet v. Aiken, 9 Lea (77 Tenn.), 609 (1882).

[6] McDuffee v. Portland & R. R. R., 52 N. H. 430, 13 Am. Rep. 72, B. & W. 149 (1873).

tinguished from a matter of private charity. If A receives, as a charity, transportation service without price, or for less than a reasonable price, from B, who is a common carrier, A does not receive it as his enjoyment of the common right; B does not give it as a performance of his public duty; C, who is required to pay a reasonable price for a reasonable service, is not injured; and the public, supplied with reasonable facilities and accommodations on reasonable terms, cannot complain that B is violating his public duty. There is, in such a case, no discrimination, reasonable or unreasonable, in that reasonable service for a reasonable price which is the common right. A person who is a common carrier may devote to the needy, in any necessary form of relief, all the reasonable profits of his business. He has the same right that any one else has to give money or goods or transportation to the poor. But it is neither his legal duty to be charitable at his own expense, nor his legal right to be charitable at the expense of those whose servant he is. If his reasonable compensation for certain carriage is one hundred dollars, and his just profit, not needed in his business, is one tenth of that sum, he has ten dollars which he may legally use for feeding the hungry, clothing the naked, or carrying those in poverty to whom transportation is one of the necessaries of life, and who suffer for lack of it. But if he charges the ten dollars to those who pay him for their transportation, if he charges them one hundred and ten dollars for one hundred dollars' worth of service, he is not benevolent himself, but he is undertaking to compel those to be benevolent who are entitled to his service; he is violating the common right of reasonable terms, which cannot be increased by compulsory contributions for any charitable purpose. So, if he carries one or many for half the reasonable price, by reimbursing himself by charging others more than the reasonable price, he is illegally administering, not his own, but other people's charity. And when he attempts to justify an instance of apparent discrimination on the ground of charity, it may be necessary to ascertain whose charity was dispensed,—whether it was his, or one

forced by him from others, including the party complaining of it."[7]

§ 734. Whether concessions may be made for special purposes.

The suggestion is made in several cases that special reductions may be made to further certain policies, provided that there is no discrimination between competitors. It is even urged that such concessions may turn out for the best interests of all concerned in the end. The weight of this line of argument may be judged by the perusal of an extract from the opinion of Judge Baxter in Hays v. Pennsylvania Company,[8] which is often quoted with approval, although it is dangerous to concede quite so much: "We need not recount all these obligations. It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. It may, however, be said that it is only when the discrimination enures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in. For instance, the carrying of one person, who is unable to pay fare, free, is no injustice to other passengers who may be required to pay the reasonable and regular rates fixed by the company. Nor would the carrying of supplies at nominal rates to communities scourged by disease, or rendered destitute by floods or other casualty, entitle other communities to have their supplies carried at the same rate. It is the custom, we be-

[7] This same point has been made in various cases, for example in: Hays v. Pennsylvania Co., 12 Fed. 309, B. & W. 368 (1882); Cook v. Chicago, R. I. & P. Ry. Co., 81 Iowa, 551, 46 N. W. 749, 25 Am. St. Rep. 512, 9 L. R. A. 764 (1890); Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674, B. & W. 380 (1894).

[8] 12 Fed. 309, B. & W. 368 (1882).

lieve, for railroad companies to carry fertilizers and machinery for mining and manufacturing purposes to be employed along the lines of their respective roads to develop the country and stimulate productions, as a means of insuring a permanent increase of their business, at lower rates than are charged on other classes of freight, because such discrimination, while it tends to advance the interest of all, works no injustice to any one." [9]

§ 735. Whether differences in the conditions of service may be recognized.

Although there will be found to be some difference of opinion as to the matters discussed in the sections immediately preceding, where the services performed are substantially identical, there is no difference of opinion as to the propriety of differences in rates where the services performed are essentially disssimilar.[10] "We believe the true rule to be that rates must not only be reasonable in themselves, but must be relatively reasonable; that is, that a person or corporation engaged in public business, and obligated to render its services to all persons having occasion to avail themselves thereof, is bound in fixing its rates to observe two rules: First, its rates must be reasonable; and, second, it must not, without a just and reasonable ground for discrimination, render to one patron services at a less rate than it renders to another, where such discrimination operates to the disadvantage of that other." [11]

[9] Whether concessions may be made for special purposes is discussed in Chapter XXII, *infra*.

See, permitting such reductions, Hoover v. Pennsylvania R. R., 156 Pa. St. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263, B. & W. 410 (1893).

But see forbidding such reductions Louisville, E. & St. L. Con. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105 and note (1892).

[10] The quotation which follows is from Irvine, C., in Western U. T. Co. v. Call Pub. Co., 44 Neb. 326, 62 N. W. 506 (1895).

[11] Citing Hays v. Pennsylvania Co., 12 Fed. 309, B. & W. 368 (1882); Scofield v. Railway Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846

"But it is not unjust discrimination—it is not contrary to the common law, and it is not contrary to our statute—to make a difference in rates where the expense or difficulty of performing the services renders such discrimination fair and reasonable." [12]

§ 736. Differences may be made proportionate to the cost of service.

It follows from what has been said that differences may be made proportionate to the cost of service without the making of any illegal discrimination; indeed, in such cases it would be unreasonable not to make such differences upon that basis. In the leading case upon this point,[13] the general principle is thus stated: "In determining the duty of a common carrier, we must be reasonable and just. The carrier should be permitted to charge reasonable compensation for the goods transported. He should not, however, be permitted to unreasonably or unjustly discriminate against other individuals, to the injury of their business, where the conditions are equal. So far as is reasonable, all should be treated alike; but we are aware that absolute equality cannot in all cases be required, for circumstances and conditions may make it impossible or unjust to the carrier. The carrier may be able to carry freight over a long distance at a less sum than he could for a short distance. He may be able to carry

(1885); Chicago & A. R. Co. v. People, 67 Ill. 11, 16 Am. Rep. 599 (1873); Railroad Co. v. Ervin, 118 Ill. 250, 8 N. E. 862 (1886); Messenger v. Railroad Co., 36 N. J. Law, 407, 13 Am. Rep. 457 (1874); Atwater v. Railroad Co., 48 N. J. Law, 55, 2 Atl. 803 (1886); McDuffee v. Railroad Co., 52 N. H. 430, 13 Am. Rep. 72, B. & W. 149 (1873); Railroad Co. v. Rust, 58 Tex. 98; Ragan v. Aiken, 9 Lea (77 Tenn.), 609 (1882).

[12] Citing Interstate Commerce Commission v. Baltimore & O. R. Co., 43 Fed. 37, affirmed s. c. 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844 (1892); Bayles v. Railway Co., 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480 (1889); Root v. Railroad Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 33, B. & W. 377 (1889); Savitz v. Railway Co., 49 Ill. App. 315, affirmed s. c. 150 Ill. 208, 37 N. E. 235, 27 L. R. A. 626 (1894).

[13] Root v. Long I. R. R., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 33, B. & W. 377 (1889).

a large quantity at a less rate than he could a smaller quantity. The facilities for loading and unloading may be different in different places, and the expenses may be greater in some places than in others. Numerous circumstances may intervene which bear upon the cost and expenses of transportation, and it is but just to the carrier that he be permitted to take these circumstances into consideration in determining the rate or amount of his compensation. His charges must therefore be reasonable, and he must not unjustly discriminate against others, and in determining what would amount to unjust discrimination all the facts and circumstances must be taken into consideration. This raises a question of fact, which must ordinarily be determined by the trial court." [14]

[14] It is universally admitted that real differences in the cost of serving justify differences in rates. This matter is discussed elaborately in Chapter XXIII *infra*. Leading cases to this effect are:

United States—Interstate Com. Com. v. B. & O. R. R., 145 U. S. 263, 36 L. Ed. 699 (1892); Western U. T. Co. v. Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561 (1901), overruling s. c. 44 Neb. 326, 62 N. W. 506 (1895); 318½ Tons of Coal, 14 Blatch. 453, Fed. Cas. 14,010, B. & W. 364 (1878); Hays v. Pennsylvania Co., 12 Fed. 309, B. & W. 368 (1882); Burlington, C. R. & N. Ry. v. N. W. Fuel Co., 31 Fed. 652 (1887).

Alabama—Lotspeich v. Central Ry. & B. Co., 73 Ala. 306 (1882).

Illinois—People v. Chicago & A. R. R., 67 Ill. 118 (1873).

Ohio—State v. Cincinnati, N. O. & T. B. Ry., 47 Ohio St. 130, 23 N. E. 928, B. & W. 400 (1890).

TITLE I.

Discrimination Between Persons.

CHAPTER XXII.

ILLEGAL DISCRIMINATION.

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§ 741. The same rate for substantially similar services.

In the preceding chapter the general principles as to discrimination were set forth, and the conclusion was reached that if two shippers asked the same service under the same conditions they ought to be given the same rate. In this chapter it is proposed to describe what substantially identical services are, and various cases are discussed where the contention has been made that the conditions were different. In most of the cases in this list it will be seen upon examination that the services are not dissimilar. Whenever a railroad initiates a policy which will get it more business or enable it to hold the business that it has, it is prone to claim that the differing conditions in the particular case justify making a lower rate to one shipper or class of shippers, while maintaining higher rates for other shippers. But in many such cases it will be found that what the railroad is doing is in the face of the principal rule forbidding personal discrimination.

TOPIC A—CONCESSIONS TO GET COMPETITIVE BUSINESS.

§ 742. Whether concessions may be made in competition.

The idea runs through certain cases that it is justifiable to make reductions to certain shippers where business cannot be obtained without it. This principle, as has been seen, has some scope in permitting the rates to stations where there is competition to be made lower relatively than the rates to stations which have no competitive rates. But it may well be doubted whether it has any operation in justifying a difference in rates between two persons shipping from the same station; for this would seem to

be personal discrimination since these two shippers are asking the same service. But to some courts it has seemed otherwise, these courts holding that if concessions are necessary to get more business by inducing a shipper who is now employing a rival route to give up his present connections, this necessity justifies the reductions. This argument apparently disregards the law of public service which, of course, governs this whole question.[1]

§ 743. Competitive conditions do not justify making discriminations.

It must be insisted upon at the outset that competitive conditions in themselves do not justify the making of personal discriminations between shippers, giving a lower rate to those to whom it is necessary to make concessions. This is forbidden both by the English courts and by the United States courts under their respective acts forbidding discrimination, but permitting reasonable concessions when the conditions are dissimilar. Thus in the leading case of London and Northwestern Railroad v. Evershed,[2] it was said: "We think that a railway company cannot, merely for the sake of increasing their traffic, reduce their rates in favor of individual customers, unless, at all events,

[1] Concessions to get competitive business have been justified in some cases even if they involve discrimination. Johnson v. Pensacola & P. R. R., 16 Fla. 623, 26 Am. Rep. 731 (1878); Chicago & A. R. R. v. Coal Co., 79 Ill. 121 (1875); Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674, B. & W. 380 (1894); Avinger v. So. Car. R. R., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716 (1888); Ragan & Buffet v. Aiken, 9 Lea (77 Tenn.), 609 (1882).

But by the better view such concessions are held unjustifiable when they involve discrimination: Wight v. United States, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. 822; Menacho v. Ward, 27 Fed. 529, B. & W. 372 (1886); Messenger v. Pennsylvania R. R., 7 Vroom (36 N. J. L.), 407, 13 Am. Rep. 457, 8 Vroom (37 N. J. L.), 531, 18 Am. Rep. 754, B. & W. 357 (1874); Brundred v. Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589 (1892); Fitzgerald v. Grand Trunk Ry., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70 (1891).

[2] L. R. 3 App. Cas. 1029 (1878).

there is a sufficient consideration for the reduction which shall lessen the cost to the company of the conveyance of their traffic, or some other or equivalent or other services are rendered to them by such individuals in relation to such traffic."

And in the important case of Interstate Commerce Commission v. Texas and Pacific Railroad Company,[3] it was said: "The Interstate Commerce Act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that unless it is given, the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them unless given exceptional rates to justify that one in making a discrimination in his favor on the ground of the necessity of the situation."

§ 744. Reductions to get competitive business illegal.

Such reductions to get business from a rival line are regarded as personal discrimination in most cases, however complicated the facts. This is a matter upon which the English cases have been particularly strong in holding that it is not sufficient that the railway company merely desires to attract the traffic from another line to itself, especially where the favor thus shown to a few is prejudicial to many others in the same trade as the favored persons.[4] Thus the fact that one shipper can go by another route and will probably do so if charged as much as the charge made to the complaining party, is not a circumstance justifying an unequal charge; nor will the fact that those charged a less rate are seeking to develop a new trade.[5] For the lowering of rates for the purpose of developing business is an undue prefer-

[3] 52 Fed. 187 (1892).

[4] Thompson v. London, etc., R. Co., 2 Nev. & Mac. 115.

[5] Denaby Main Colliery Co. v. Manchester, S. & L. R. Co., L. R. 11 App. Cas. 97.

ence;[6] and so is making a lower rate in consequence of a threat from the owner of a colliery to construct another railway, by which traffic would be diverted.[7]

§ 745. Concessions allowed by some cases to get shipments from outlying territory.

It has been seen that some courts permit any difference in the situation to be seized upon as a reason for making a discrimination. Thus in Ragan & Buffet v. Aiken,[8] where a bill in equity was filed by merchants at a station on the defendant's railway who were charged a twenty-five-cent rate, who alleged that other shippers who brought their goods from an outlying district were charged only a fifteen-cent rate, the court sustained a demurrer to the bill, taking the ground that there was a difference shown in the circumstances. The argument of Mr. Justice Cooper in writing the opinion of the court was:

"In determining whether or not a company has given undue preference to a particular person, the court may look to the interests of the company.[13] In other words, if the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to as to all persons in like condition, it may, nevertheless, lower the charge to another person if it be to the advantage of the company, *not inconsistent with the public interest,* and based on a sufficient reason. It is obvious that the intention of the defendant, in this instance, was not to discriminate against the complainants in favor of any person of the same place, and in the same condition. His object was to get business for his road from persons at a distance from its terminus, which otherwise would reach their destination by a differ-

[6] Oxlade v. North Eastern R. Co., 1 C. B. N. S. 454, S. C. 26 L. J. C. P. 129, 1 Nev. & Mac. 72.

[7] Harris v. Cockermouth & W. R. Co., 3 C. B. N. S. 693, S. C. 27 L. J. C. P. 162, 1 Nev. & Mac. 97.

[8] 9 Lea (77 Tenn.), 609 (1882).

[13] Citing Ransome v. Eastern Counties Ry., 1 C. B. N. S. 437 (1855).

ent route. Under these circumstances we cannot see that the contracts complained of are against public policy, or that the complainants have been damaged, if the charges on their goods were reasonable. The bill contains no allegation that the charges made against, and paid by the complainants, were unreasonable. Without such an averment, there has been no damage. The third ground of demurrer was, therefore, well taken." [14]

§ 746. Such concessions forbidden by later cases.

But such concessions are forbidden by the later cases as illegal discrimination. Thus in one proceeding before the Interstate Commerce Commission,[15] the facts shown were that a higher rate was charged to goods brought to one terminus for consumption there than for goods which were to be carted beyond to another district. In declaring this illegal, Commissioner Morrison said: "In collecting more from complainants and others for carrying goods to Eureka Springs, not to be forwarded, than they accept for carrying goods of the same classes from the same places to Eureka Springs to be forwarded to points in said Harrison transportation district, the defendants receive greater compensation from complainants than from other persons for 'a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions,' and are guilty of unjust discrimination; and in thus denying to complainants and other shippers of articles to Eureka Springs, for use there or for distribution from that place, the same transportation charges which they accord to shippers and and receivers of like articles there to be forwarded to Harrison and other places for distribution, the defendants subject the complainants, the business in which they are engaged, and the city of Eureka Springs to unreasonable disadvantage and give

[14] In the important case of Johnson v. Pensacola & P. R. R., 16 Fla. 623, 26 Am. Rep. 731 (1878), the facts and the decision were the same.

[15] Cary v. Eureka Springs Ry., 7 I. C. C. Rep. 286 (1897).

to Harrison and such other places, and to shippers and receivers of articles of freight at such other localities, undue preference. The defendant railway companies will be required to discontinue the illegal practice of exacting from complainants and other shippers to Eureka Springs proper, any greater charges than are at the same time demanded and received from other persons for the transportation of freights to Eureka Springs to be forwarded to more favored localities." [16]

§ 747. Shippers making expensive preparations cannot be favored.

In Bundred v. Rice,[17] a shipper of oil set forth in his complaint a most extraordinary state of affairs—a contract whereby a railroad company bound itself to carry for one shipper crude petroleum at half the rate it agreed to charge all others, and to pay such favored shipper one half the amount collected from others, in consideration of his agreeing to establish and maintain a system of pipe lines to its road. This was held wholly void and money so paid by a shipper in ignorance of the agreement, and received by the favored shipper was recovered back in an action for money had and received by the former against the latter. An extract from the *per curiam* opinion follows: "That the contract between Brundred and his associates was against public policy, and void, will hardly admit of a question. As said by Baxter, J., in Handy v. Railroad Co.:[18] 'Railroads are constructed for the common and equal benefit of all persons wishing to avail themselves of the facilities which they afford. While the legal title thereof is in the corporation or individuals

[16] Compare Bigbee & W. R. Packet Co. v. Mobile & Ohio R. R., 60 Fed. 545 (1893), where the court laid it down as a fundamental principle that all goods offered for shipment at a certain point must be carried at the established rate for such goods from such point, regardless of the place where they originated.

[17] 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589 (1892)

[18] 31 Fed. 689 (1888).

owning them, and to that extent private property, they are, by the law and consent of their owners, dedicated to the public use. Except in the mode of using them, every citizen has the same right to demand the services of railroads, on equal terms, that they have to the use of a public highway, or the government mails.' Whatever may have been the financial condition of the railroad company, it was not warranted in making a contract by which it bound itself to carry for one shipper at half the rate it agreed to charge all others for the same service, in consideration of his agreeing to establish a system of pipe lines to its road; at the same time and for the same consideration binding itself to charge all others double the amount as a fixed, open rate, and to pay to such favored shipper one half of it when collected."

§ 748. **Additional services performed for certain shippers.**

Upon the general principles now under discussion it will constitute discrimination to perform additional services for certain shippers in order to get their business. The issue has several times been raised whether it would be permissible for a railroad to make allowance for cartage to certain shippers distant from the station, while making no such allowance to other shippers, and the decision has always been that this would be illegal discrimination.[19] For the feeling has been universal that the varying cost of shippers in delivering to the carrier for shipment can have no bearing on the case. In the most important case of this series,[20] Mr. Justice Brewer said: "It is contended by the defendant that it was necessary for the Baltimore & Ohio Company to offer this inducement to Mr. Bruening in order to get his business, and not necessary to make the like offer to Mr. Wolf, because he would have to go to the expense of carting, by

[19] Wight v. United States, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. 822 (1897); Hezel Milling Co. v. St. Louis, A. & T. H. R. R., 5 I. C. C. Rep. 57; Chicago F. P. C. Co. v. Chicago & N. W. Ry., 8 I. C. C. Rep. 316; The Brandt Milling Co.'s Case, 4 Can. Ry. Cas. 259.

[20] Wight v. United States, *supra*.

whichever road he transported; that therefore the traffic was not 'under substantially similar circumstances and conditions.' within the terms of section 2. We are unable to concur in this view. Whatever the Baltimore & Ohio Company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another. Counsel insist that the purpose of the section was not to prohibit a carrier from rendering more service to one shipper than to another for the same charge, but only that for the same service the charge should be equal, and that the effect of this arrangement was simply the rendering to Mr. Bruening of a little greater service for the 15 cents than it did to Mr. Wolf. They say that the section contains no prohibition of extra service or extra privileges to one shipper over that rendered to another. They ask whether, if one shipper has a siding connection with the road of a carier, it cannot run the cars containing such shipper's freight onto that siding, and thus to his warehouse, at the same rate that it runs cars to its own depot, and there delivers goods to other shippers who are not so fortunate in the matter of sidings. But the service performed in transporting from Cincinnati to the depot at Pittsburg was precisely alike for each."

TOPIC B—CONCESSIONS TO LARGE SHIPPERS.

§ 749. **Whether concessions may be made to large shippers.** Common carriers have often given special discounts to large shippers in order to get their trade or to retain it, and sometimes they have attempted to defend this practice upon general principles. That this policy may often be advantageous in public business, as it is in private business, may be admitted,

but it has already been seen that public duty may conflict with business policies. If, therefore, these concessions to larger shippers are in conflict with the public duty which the common carrier owes to smaller shippers, they must be held illegal as unjust discriminations. And this will be the clearer when it is shown that the favoring of such large shippers will give them such commercial advantages that they may crush out their smaller competitors in the common markets. The rule forbidding the granting of special reductions to larger shippers as such on the ground that they furnish a greater aggregate of business to the common carrier is therefore a necessary part of the law forbidding all personal discrimination.[1] "The fact that one man is a large shipper and another a small shipper does not entitle the carrier to make a difference in the rate, if the property carried in each case is of the same class, and the distance and route is the same." [2]

§ 750. **Unreasonable differences forbidden by all courts.**

All courts would agree that if there is an unreasonable difference made between the rates given to the large shipper and the rates charged a small shipper the schedule is illegal in that re-

[1] The quotation which follows is from United States v. Tozer, 39 Fed. 369 (1889).

[2] By the weight of authority it is illegal to make reductions to large shippers as such. The principal cases are listed below: Western U. T. Co. v. Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561 (1901), overruling s. c. 44 Neb. 326, 62 N. W. 506 (1895); Hays v. Pennsylvania Co., 12 Fed. 309, B. & W. 368 (1882); Burlington, C. R. & N. Ry. v. N. W. Fuel Co., 31 Fed. 652 (1887); Kinsley v. Buffalo, N. Y. & P. Ry., 37 Fed. 181 (1888); United States v. Tozer, 39 Fed. 369 (1889); Fitzgerald v. Grand Trunk Ry., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70 (1891).

But see Savitz v. Ohio & M. Ry., 150 Ill. 208, 37 N. E. 235, 27 L. R. A. 626 (1894), affirming 49 Ill. App. 315; Cook v. Chicago, R. I. & Pac. Ry. Co., 81 Iowa, 551, 46 N. W. 749, 25 Am. St. 512, 9 L. R. A. 764 (1890); Rothschild v. Wabash, St. L. & P. C. R., 92 Mo. 91, 4 S. W. 418 (1887); Concord & P. R. R. v. Forsaith, 59 N. H. 122, 47 Am. Rep. 181 (1879); Silkman v. Yonkers Water Commissioners, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827, B. & W. 363 (1897).

spect. The case of the Burlington, Cedar Rapids and Northern Railway Company,[3] which is often cited in this connection, goes no further than this, after all. In that case there was an attempt by a large shipper to enforce a contract by which a railroad company agreed to charge a rate of not less than $2.40 per ton to all persons shipping less than 100,000 tons of coal per annum over its road, and to make a rate of $1.60 per ton to all shippers shipping 100,000 tons or over. Mr. Justice Brewer, then upon circuit, held the whole contract void as against public policy; he said in part: "If it be true, as held by Judge Wallace, that the rule forbidding an unjust discrimination does not necessarily prevent a railroad company from charging a less rate to one who ships a large quantity than to one who ships a small quantity, (and I am not prepared to deny that under some circumstances, there is force in that proposition, on the same principle that a wholesale dealer sells a large bill of goods at a less rate than a small bill of goods,) yet, even with that limitation, a discrimination so vast as this is, and so purely arbitrary, and which is so obviously solely in the interest of capital, and not based upon reasonable distinction in favor of a large as against a small shipper, cannot be sustained. For here the contract provides a special rate for shipment of 100,000 tons or over; that is, for one who ships 99,500 tons it makes a rate of $2.40; while to the man who ships 100,000 tons, or 500 tons more than the other, it makes a rate of $1.60,—a difference of 50 per cent. in favor of the latter. Such a discrimination, even if any discrimination based upon the amounts of shipments is tolerable, is one so gross that it cannot be sustained. No person can read that contract in the light of the circumstances without perceiving that there was on the part of the fuel company an attempt to monopolize the entire product of this coal-field, as far as respects this market; and it would be part and parcel of simi-

[3] Burlington, C. R. & N. Ry. v. Northwestern Fuel Co., 31 Fed. 652 (1887).

lar purposes to control in like manner the products of other coal-fields. To sustain the contract even in part would practically validate it for all purposes, and lend the aid of the court to the furtherance of such an objectionable scheme."

§ 751. Reasonable differences permitted by some courts.

In a very few jurisdictions it has been held that there is no legal objection to making a retasonable difference in the rates given to large shippers in comparison with the rates charged small shippers. The argument is that this is a business policy universally practiced; but the answer seems to be that this may nevertheless be opposed to the peculiar duties which the common carrier owes to the public as a whole. However, an extract is given from the opinion of Mr. Justice Allen in Concord and Portsmouth Railroad Company v. Forsaithe,[4] so that the weight of this argument may be felt. In holding that the complainant, a small shipper, had no case, even under a statute which forbade discriminations, he said: "The terms of the statute must receive the interpretation which long-established usage and the custom of the commercial world have given them. That custom in all branches of business always has been, and is, to move, care for, and sell a large amount of a given commodity, in one parcel or in a given time, at a less price per pound, yard or ton, than a smaller quantity of the same commodity, distributed in many and smaller parcels at different times. The expense of handling, carrying, and storing the smaller amount is much greater, *pro rata,* than that of the same operations upon the larger amount in one body, and a discrimination in favor of the larger dealers is not inequality, but reasonable equality. By any other construction the statute would defeat itself; for taking into account the lessened expense *pro rata* for transporting the greater amount of property in a single body or in a given time, the carrier would, by absolute equality of rates for all cases, receive a greater price

[4] 59 N. H. 122 (1879).

rate for carrying the larger quantity than the smaller, and thereby make an unjust discrimination against the person transporting the largest quantity of goods. Unreasonable equality is inequality." [5]

§ 752. Prevalent doctrine that no reduction should be allowed.

It may be asserted with confidence, however, that it is opposed to fundamental principles to permit the giving of special concessions to the large shipper as such. In the leading case of Hays v. Pennsylvania Company,[6] this doctrine is well worked out. The plaintiffs in that case were, for several years next before the commencement of this suit, engaged in mining coal at Salineville and near defendant's road, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. Their complaint was that the defendant discriminated against them and in favor of their competitors in business, in the rates charged for carrying coal from Salineville to Cleveland. It appeared in evidence that defendant's regular price for carrying coal between the points mentioned, in 1876, was $1.60 per ton, with a rebate of from 30 to 70 cents per ton to all persons

[5] To the same effect is Silkman v. Water Commissioners, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827, B. & W. 363 (1897), where it was held that lower water rates might be given to large consumers than to small consumers, the court saying: "The objection made here is that the persons who consumed the large quantities of water were not charged as much per hundred cubic feet as those who consumed a less amount. Under this statute the question of consumption was one of the elements to be considered in determining the rates. Surely, it cannot be said to be unreasonable to provide less rates where a large amount of water is used than where a small quantity is consumed. That principle is usually present in all contracts or established rents of that character. It will be found in contracts and charges relating to electric lights, gas, private water companies, and the like, and is a business principle of general application. We find in the rates as they were established nothing unreasonable, or that would in any way justify a court interfering with them."

[6] 12 Fed. 309, B. & W. 368 (1882).

or companies shipping 5,000 tons or more during the year,—the amount of rebate being graduated by the quantity of freight furnished by each shipper. Under this schedule the plaintiffs were required to pay higher rates on the coal shipped by them than was exacted from other and rival parties who shipped larger quantities. But the defendant contended, if the discrimination was made in good faith, and for the purpose of stimulating production and increasing its tonnage, it was both reasonable and just, and within the discretion confided by law to every common carrier. The court, however, entertained the contrary opinion.

In an excellent opinion by Baxter, the United States Circuit Judge, the various grounds upon which differences in rates have been justified by reason of differences in the cost of service by reason of economies of handling the business were reviewed,[7] but he held very properly that none of these applied to the exclusive shipper as such, his conclusion being well worth quoting at length. "In all particulars the plaintiffs occupied common ground with the parties who obtained lower rates. Each tendered coal for transportation in the same condition and at such times as suited his or their convenience. The discrimination complained rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis be sustained? If so, then the business of the country is, in some degree, subject to the will of railroad officials; for, if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender

[7] Discussing particularly Nicholson v. Gt. Western Ry., 5 C. B. N. S. 366 (1858).

to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same."

§ 753. Reductions to large shippers unjust to small shippers.

Naturally the practice of some railroads under some circumstances of making lower rates to large customers was one of the first complaints brought to the Interstate Commerce Commission. One of those cases was Providence Coal Company v. Providence & Worcester Railroad Company,[8] in which case it appeared that the tariff of the railroad on coal contained a provision for a discount of 10 per cent. to any person, firm or company, who shall receive consignments of coal, in any one year, amounting to 30,000 tons or upwards, at any one station on the line of this road. In argument for the railroad an effort was made to uphold the discrimination on a consideration of quantity merely; the consignee who should receive more than 30,000 tons in a year at any one station, being likened to a purchaser of goods at wholesale, and the consignee who received a lesser amount being compared to a purchaser at retail. It was said that a distinction in price is universally made as between these two classes of customers, and that distinction would be as reasonable in the case of purchasers of railroad service as in that of purchasers of cloths or lumber.

But the Commission was very plainly of a contrary opinion, Mr. Commissioner Cooley saying: "When a question of rebates or discounts is under consideration, it might be misleading to

[8] 1 Int. Com. Rep. 363, 1 I. C. C. Rep. 107 (1887).

consider them in the light of the principles which merchants act upon in the case of wholesale and retail transactions. There is very manifest difficulty in applying those principles to the conveniences which common carriers furnish to the public, a difficulty which springs from the nature of the duty which such carriers owe to the public. That duty is one of entire partiality of service. The merchant is under no corresponding duty, and may make his rules to suit his own interest, and discriminate as he pleases. There is no occasion to enlarge upon this now.

"A discrimination, such as the offer and its acceptance by one or more dealers would create, must have a necessary tendency to destroy the business of small dealers. Under the evidence in the case it appears almost certain that this destruction must result, the margin for profit on wholesale dealings in coal being very small. The discrimination is therefore necessarily unjust within the meaning of the law. It cannot be supported by the circumstance that the offer is open to all; for although made to all, it is not possible that all should accept. Moreover, in testing such a discrimination we must consider the principle by which it must be supported; and the principle which would support a 30,000 ton limitation would support one of 50,000 or 100,000 equally well; the quantity named would be arbitrary in any case. It might easily be so high as practicably to be open to the largest dealer only. A railroad company, if allowed to do so, might in this way hand over the whole trade on its road in some necessary article of commerce to a single dealer; for it might at will make the discount equal to or greater than the ordinary profit in the trade; and competition by those who could not get the discount would obviously be then out of the question. So extreme a case would not, however, be needful to show the inadmissibility of such a discount as is here offered; the injustice would be equally manifest if several dealers instead of one were able to accept the offer. A railroad company has no right, by any discrimination not grounded in reason, to put any single dealer,

whether a large dealer or a small dealer, to any such destructive disadvantage."

§ 754. Services to large shippers and to small shippers practically identical.

Moreover, the services to large shippers and to small shippers are practically identical. The large shipper sends more carloads in the aggregate than the small shipper, it is true; but it makes no real difference whether a railroad takes two cars from A or one car each from A and B. And it is plain that to carry two barrels of sugar for one person on a given date, and to carry one barrel of sugar for another person, between the same points, over the same route, two days later, are contemporaneous, and like services.[9] The argument may be pressed further: It is not in the least certain that the shipper who furnished the largest aggregate tonnage during the year may not have shipped in the most irregular way in the most inconvenient quantities. There is, therefore, nothing to differentiate the services performed for a large shipper in comparison with a small shipper. In Kinsley v. Buffalo, New York & Philadelphia Railroad Company[10] this was well argued in granting a petition of one Couper alleging that there had been illegal discrimination against him by the receiver of a railroad then operated under the control of the court. It was said per curiam: The petitioner seeks to obtain reimbursement from the receiver of the sum of $478.44, with interest from April 3, 1887, which he alleges was unlawfully exacted from him as and for freights for the transportation of oil upon the railroad in the custody of the receiver. The exaction of this sum is admitted, as is also the fact that a less rate was charged to another shipper of oil upon the railroad. This charge is justified by the master upon the ground that the quantity of oil shipped by another shipper

[9] United States v. Tozer, 39 Fed. 369 (1889).
[10] 37 Fed. 181 (1888).

was much larger than that shipped by the petitioner, and hence that the larger proportionate expense attending the handling and transportation of the smaller shipment warranted a higher rate than was charged for the larger shipment. In this conclusion we do not agree with the learned master. It does not differentiate the service performed for the several shippers, nor the conditions or circumstances under which it was performed. The only difference is that in one case the quantity shipped was larger, and in the other case it was smaller. This has been repeatedly held to be an insufficient and unwarrantable reason for discriminating rates of charge.[11]

§ 755. **Reductions to passengers in parties.**

Reductions to passengers in parties can only be justified if there is a difference in the cost of service. Thus such reductions were held by the Interstate Commerce Commission[12] to forbid granting a special reduced rate to all persons traveling in parties of ten or more. The Commission ruled that the selling of "party rate" tickets was not within any of the discriminations specifically excepted and allowed by section 22 of the Act, gave no effect to the fact that the discrimination created new business and was not between competitors, held that equality of treatment of every person must be preserved and stated that "It is difficult to see how this individual equality is preserved when in a carload, say of nineteen persons, all starting from the same point and having the same destination, ten of them pay two cents per mile each, and the other nine three cents." The Supreme Court,[13] however, rightly held that conveying one person singly and conveying him as one of a party of ten did not constitute like services, "under substan-

[11] Citing Hays v. Pennsylvania Co., 12 Fed. 309 (1882).

[12] Pittsburg. C. & St. L. R. Co. v. B. & O. R. Co., 2 Int. Com. Rep. 729, 3 I. C. C. Rep. 465 (1890).

[13] Interstate Com. Com. v. B. & O. R. R., 145 U. S. 263, 12 Sup. Ct. 844 (1895).

tially similar circumstances and conditions," that the making of a lower rate per capita for party rate tickets was a due and reasonable preference and not unlawful discrimination. In delivering the opinion of the court in the case last referred to, Mr. Justice Brown said: "Whether these party rate tickets are commutation tickets proper, as known to railway officials, or not, they are obviously within the commuting principle. As stated in the opinion of Judge Sage in the court below: 'The difference between commutation and party rate tickets is that commutation tickets are issued to induce people to travel more frequently, and party rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to induce travel without unjust discrimination, and to secure patronage that would not otherwise be secured.' . . .

"In order to constitute an unjust discrimination under section 2 the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.' To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible."[14]

[14] Refusing the party ticket rate to the United States Government for the transportation of soldiers in parties numbering ten or over has properly been held, in United States v. Chicago & N. W. Ry. Co., 127 Fed. 785 (1904), not to be unlawful discrimination, as the conditions surrounding such transportation were found to be different from those of ordinary parties; the government not paying in advance was one reason.

TOPIC C—REBATES TO EXCLUSIVE SHIPPERS.

§ 756. Whether lower rates may be made to exclusive shippers.

The advantages which may accrue to the railroad company if it may make lower rates to those who will ship by it exclusively are plain and this policy would largely prevail in making rates between competitive points doubtless if it were not for the recognition of its essential illegality. That such a policy may be advantageous to the company which employs it may be granted, but it has already been seen that those who conduct a public employment must forgo many methods of getting business and holding it which are permissible in private affairs.[1] The chief argument made in favor of such specially lower rates to those who will ship exclusively is to say that there is in reality no personal discrimination in such an arrangement when it is open to all who choose to conform to the condition. But this is as inconclusive here as it is when used in support of other kinds of discrimination between different shippers, for if the condition is one which it is inconsistent with public duty to impose, there is no legal justification for any departure from equality of rates to all who ask the same transportation for like goods.[2]

[1] See Chapter X, *supra*.

[2] By the general rule it would seem to constitute illegal discrimination to give rebates to exclusive shippers.

United States—Menacho v. Ward, 27 Fed. 529, B. & W. 372 (1886); Bigbee & W. R. P. Co. v. Mobile & O. Ry. Co., 60 Fed. 545 (1893).

Alabama—Mobile v. Bienville Water S. Co., 130 Ala. 379, 30 So. 445, B. & W. 417 (1901).

Indiana—Louisville, E. & St. L. Con. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105 and note (1892).

Missouri—McNeer v. Mo. Pac. Ry., 22 Mo. App. 224 (1886).

New Jersey—Messenger v. Pennsylvania R. R., 7 Vroom (36 N. J. L.), 407, 13 Am. Rep. 457, 8 Vroom (37 N. J. L.), 531, 18 Am. Rep. 754, B. & W. 357 (1874).

North Carolina—Hilton Lumber Co. v. Atlantic Coast Line, 136 N. C. 479, 48 S. E. 813 (1904).

§ 757. Shippers who use rival lines must not be charged more than usual rates.

It would seem to be plainly contrary to public duty for a common carrier to charge shippers who at times employ a rival carrier in their shipments more than the usual rates which other shippers are charged. Yet this sort of discrimination has been defended before the courts more than once even in its most extreme forms. The leading case on this point is undoubtedly Menacho v. Ward,[3] the facts of which it is necessary to state rather fully. It was alleged by the complainant that the defendants had announced generally to New York merchants engaged in Cuban trade that they must not patronize steamships which offered for a single voyage, and on various occasions when other steamships had attempted to procure cargoes from New York to Havana had notified shippers that those employing such steamships would thereafter be subjected to onerous discriminations by the defendants. The defendants alleged in their answer to the bill, in effect, that it has been found necessary, for the purpose of securing sufficient patronage, to make differences in rates of freight between shippers in favor of those who will agree to patronize the defendants exclusively. Within a few months before the commencement of this suit two foreign steamers were sent to New York to take cargoes to Havana, and the complainants were requested to act as agents. Thereupon the complainants were notified by the defendants that they would be "placed upon the black-list" if they shipped goods by these steamers, and that their rates of freight would thereafter be advanced on all goods which they

Ohio—Scofield v. L. S. & M. S. R. R., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846 (1885); Brundred v. Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589 (1892).

But see Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674, B. & W. 380 (1894), and Fitchburg R. R. v. Gage, 12 Gray (Mass.), 393, B. & W. 354 (1859).

[3] 27 Fed. 529 (1886).

might have occasion to send by the defendants. Since that time the defendants have habitually charged the complainants greater rates of freight than those merchants who shipped exclusively by the defendants.

In disposing of this case Mr. Justice Wallace pointed out that there were various situations justifying different rates between shippers asking for the same transportation, and in enumerating them he was undoubtedly unduly liberal; but this particular case before him he rightly decided to go beyond all justification as the conclusion of his opinion which follows will show:

"It is upon this foundation, and not alone because the business of common carriers is so largely controlled by corporations exercising under franchises the privileges which are held in trust for the public benefit, that the courts have so strenuously resisted their attempts, by special contracts or unfair preferences, to discriminate between those whom it is their duty to serve impartially. And the courts are especially solicitous to discountenance all contracts or arrangements by these public servants which savor of a purpose to stifle competition or repress rivalry in the departments of business in which they ply their vocation.[7]

"The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the pub-

[7] Citing Coe v. Louisville & N. R. Co., 3 Fed. Rep. 775, B. & W. 251 (1880).

lic as carriers between these places. Such discrimination is not only unreasonable, but is odious." [8]

§ 758. Whether lower rates may be given those who ship exclusively.

On the other hand it is maintained by some few courts that while higher than usual rates cannot be charged those who will not ship exclusively, yet lower rates may be given to exclusive shippers. That this is the view of the highest court in New York may be seen by an examination of the leading case of Lough v. Outerbridge.[9]

In order to present the question clearly a brief statement of the facts becomes necessary. The plaintiffs were commission merchants in the city of New York, transacting their business mainly with the Windward and Leeward Islands. The defendant, the Quebec Steamship Company, had in its service a fleet of five or six of the highest class iron steamers, sailing at intervals of about ten days from New York to the islands, each steamer requiring about six weeks to make the trip. The steamers were kept constantly engaged in this service and sailed regularly upon schedule days without reference to the amount of cargo then received. Its regular rate in 1892 was 40 cents per dry barrel of five cubic feet, which was taken as the unit of measurement, and the tariff of charges was adjusted accordingly for goods shipped in other forms and packages. About this time the British steamer El Callao, which had for some years before sailed between New York and Ciudad Bolivar, in South America, transporting passengers and freight between these points, began to take cargo at New York for Bar-

[8] *A fortiori* it is illegal to refuse altogether to serve an applicant who persists in shipping by a rival line. See § 294, *supra*. And likewise a passenger who has come a part of the way by a rival line must be accepted. See § 293, *supra*.

[9] 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674, B. & W. 380 (1894).

badoes, and sometimes to other points in the Windward Islands which she passed on her regular trips to Ciudad Bolivar, sailing from New York at intervals of five or six weeks. Her trade with South America was the principal feature of her business, but such space as was not required for the cargo destined for the end of the route was filled with cargo for the islands which lay in her regular course. The defendants evidently regarded this vessel as a somewhat dangerous competitor for a part of the business, the benefits of which they had up to this time enjoyed; and, for the purpose of retaining it, they adopted the plan of offering special reduced rates of 25 cents per dry barrel to all merchants and business men in New York who would agree to ship by their line exclusively during the week that the El Callao was engaged in obtaining freight and taking on cargo. This 25 cent rate was refused to the plaintiffs, as they shipped part of their goods by El Callao.

The Court of Appeals of New York, one justice dissenting, held for the defendant company. In writing the opinion of the court Mr. Justice O'Brien expressed agreement with those courts which had said that the principal requirement of the law was that the rates charged different shippers must be reasonable taken separately. Relying upon these cases together with others permitting the granting of reductions of various sorts for various reasons, he came to this conclusion:

"The authorities cited seem to me to remove all doubt as to the right of a carrier, by special agreement, to give reduced rates to customers who stipulate to give them all their business, and to refuse these rates to others who are not able or willing to so stipulate, providing, always, that the charge exacted from such parties for the service is not excessive or unreasonable. The principle of equality to all, so earnestly contended for by the learned counsel for the plaintiffs, was not, therefore, violated by the defendants, since they were willing and offered to carry the plaintiffs' goods at the reduced rate, upon the same

terms and conditions that these rates were granted to others; and, if the plaintiffs were unable to get the benefit of such rate, it was because, for some reason, they were unable or unwilling to comply with the conditions upon which it was given to their neighbors, and not because the carrier disregarded his duties or obligations to the public. The case of Menacho v. Ward,[10] does not apply, because the facts were radically different. That action was to restrain the carrier from exacting unreasonable charges habitually for services, the charges having been advanced as to the parties complaining, for the reason that they had at times employed another line. It decides nothing contrary to the general views here stated." [11]

Notwithstanding the weight to be given to this decision it is submitted that it is opposed to what are conceived to be fundamental principles. As between two shippers who offer the same goods for the same transportation it seems to be personal discrimination with all its accompanying evils to make one rate to one and another rate to another by reason of the fact that one ships exclusively and the other does not. And it ought to be plain that whether this is done as in Menacho v. Ward [12] by charging the one who does not ship exclusively more than the usual rate or as in this case of Lough v. Outerbridge [13] by giving

[10] 27 Fed. 529 (1886).

[11] The cases principally relied upon by the court in reaching this opinion were: Fitchburg Railroad Co. v. Gage, 12 Gray, 393, B. & W. 354 (1859); Sargent v. Railroad Co., 115 Mass. 422 (1874); Mogul Steamship Co. v. McGregor, 21 Q. B. Div. 544, affirmed 23 Q. B. Div. 598, and by H. L. 17 App. Cas. 25 (1892); Evershed v. Railway Co., 3 Q. B. Div. 135.

It seems that the important case of Mogul Steamship Company v. McGregor, *supra*, cannot be cited, for the proposition that in public business a rebate may be given exclusive shippers. The ship owners in that case may have been private carriers for all that appears; at all events the point that they were common carriers was not made by the courts or by counsel, so far as can be discovered.

[12] 27 Fed. 529, B. & W. 372 (1886).

[13] 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674, B. & W. 380 (1894).

exclusive shippers concessions from regular rates, the fact remains that in either case there is a personal discrimination against the shipper who will not enter into an exclusive arrangement.

§ 759. Shippers who agree to give all their business.

The mere fact that a shipper agrees to give all his business to the carrier does not justify a concession from regular rates. Such inducements seem once to have been held out to shippers commonly in England; but the decisions of the courts have been against them.[14] They have uniformly held it unlawful preference to give reduced rates in consideration of an agreement to employ other lines of the company for the carriage of other traffic or to employ the company in other distinct business; which is obviously good law, as the carriage of goods to other points does not affect the cost of carriage between the particular points.[15]

Upon the same principles the railways have been forbidden to charge a higher wharfage rate on goods to be conveyed by another railway [16] or to grant a reduced rate in consideration of a contract to carry all of certain goods and to prevent their being carried by water or other means.[17]

It seems plain that in all of these cases no other decisions would have been justifiable than those which were given, because the policies pursued by the railways in all of these cases seem opposed to the public duty which the common carrier owes the shipping public.

[14] Baxendale v. Great Western R. Co., 5 C. B. N. S. 309 (1858); Diphwys Casson Slate Co. v. Festining R. Co., 2 Nev. & Mac. 73 (1860); Bellsdyke Coal Co. v. N. B. R. Co., 2 Nev. & Mac. 105 (1860).

[15] Baxendale v. Great Western R. Co., 5 C. B. N. S. 309 (1858); Twellis v. Pa. R. R. Co., 3 Am. L. Reg. N. S. 728 (1863); Bellsdyke Coal Co. v. North British R. Co., 2 Nev. & Mac. 105 (1860).

[16] Toomer v. London R. Co., 3 Nev. & Mac. 79 (1865).

[17] Garton v. Bristol & E. R. R. Co., 1 Nev. & Mac. 218 (1856).

§ 760. Shippers who agree to furnish large quantities of freight.

It would seem to follow, although this has appeared to some courts [18] more doubtful that shippers who agree to furnish large quantities of freight should have no better standing. It is true that the advantage to the railroad company may be proved, but the injustice to the small shipper who can make no such undertaking remains the controlling factor in the situation. This was well shown in an Indiana case [19] where the court said:

"It is contended by the appellant that, in view of the fact it secured by its contract with Dickason a certain income of $7,000 per month, it could as well afford to carry ties for him at $14 per car as to carry them for the appellees at $24 per car. We find it unnecessary to inquire whether the appellant is correct or otherwise in this contention, for, as we understand the law, a railroad company engaged in the business of a common carrier is not permitted by the law to discriminate in favor of a shipper who is able to furnish a large amount of freight over one engaged in the same business who is unable to furnish the same quantity as that shipped by his more opulent rival. The reasons for prohibiting such discrimination are well stated in the case of Hays v. Pennsylvania Co.[20] In our opinion, the fact that Dickason was able to furnish a larger number of car loads of ties for shipment than the appellees could constituted no sufficient reason for a discrimination in his favor over the rates charged to the appellees."

§ 761. Charging other shippers more than contract rates.

In the interesting case of Houston and Texas Central Railroad Company v. Rust, [21] the railroad and certain shippers

[18] Nicholson v. Great Western Ry., 5 C. B. N. S. 366 (1858).

[19] Louisville, E. & St. L. C. R. R. v. Wilson, 132 Ind. 517, 32 N. E. 311 (1892).

[20] 12 Fed. 309, B. & W. 368 (1882).

[21] 53 Tex. 98 (1882).

entered into an agreement by which the shippers promised to ship all their goods and the railroad undertook to give a certain rate. Later they raised other rates. This the court held not to be discrimination against other shippers.

"The test of liability submitted by the charge was confined to the single question of inequality in the rate of freight charged to the plaintiffs as compared to the rate charged to certain other specified persons, irrespective of any or all or all of the other facts of the case. In that the court erred. It ought to have been submitted to the jury to determine whether under all the facts of the case, the defendant charged the plaintiffs a rate beyond what was reasonable, and beyond the price which was exacted of the public generally at the times when the plaintiffs shipped their cotton on the defendant's railroad. And, if, although the plaintiffs were not required to pay a higher rate than the public genarally, yet if the defendant had allowed to certain particular persons or merchants in a certain particular locality, more advantageous terms than had been given to the public generally, or to the plaintiffs, it ought to have been submitted as an issue of fact for the jury to determine, whether (under appropriate instructions applicable to the subject), under all the evidence applicable to the question, such preference so given was a fair and legitimate one; one justified by the common law rule forbidding the carrier to give one special privileges which it denies another, but which at the same time does not exclude as forbidden contracts for transportation at a less rate in special cases, where, under the circumstances, the discrimination appears reasonable."

TOPIC D—CONCESSIONS FOR SPECIAL KINDS OF BUSINESS.

§ 762. **Different rates for goods used for different purposes.**

It is strongly urged by the railroads that they should be allowed to make different rates for goods which are going to be used for different purposes. It is pointed out that in order to

get more traffic, which by reason of the law of increasing returns is for the benefit of all concerned, it will often be necessary for them to make lower rates for goods which are going to be used for one purpose than for goods which are going to be used for another purpose. Moreover, the railroad managers take a higher plane of argument when they urge that to make different rates for different users they may further the development of the industries of the communities which they serve. But neither of these arguments can be pushed too far in a legal discussion because in so far as any railroad policy involves discrimination it is illegal; and to charge one of two shippers who wants exactly the same transportation of the same goods one rate while another shipper is charged another rate is personal discrimination *prima facie*.[1]

§ 763. Such rates allowed by some cases.

The argument for allowing the making of different rates for the same commodities which are destined to be used for different purposes is a strong one. How strong it is from an economic point of view may be seen by an examination of the leading case supporting this argument, Hoover v. Pennsylvania Railroad.[2] In that case the court held that an agreement to charge a uniform rate on shipment of coal to the Bellefonte Nail Works for consumption in operating its machienry could not be complained of as unjust discrimination against a mere

[1] Whether concessions may be made for special kinds of business is a debated question. In the following case such reductions are allowed: Hoover v. Pennsylvania R. R., 156 Pa. St. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263, B. & W. 410 (1893).

But in the following case such reductions are forbidden: Fitzgerald v. Grand Trunk Ry., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70 (1891).

[2] 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43, B. & W. 410 (1893).

dealer, who received his coal over the same road and was charged a higher rate. This was held not to be unjust discrimination, the court relying upon the broadest grounds of public policy to justify this result, Mr. Justice Green saying:

"It is matter of public history that along the valleys of the Lehigh and the Schuylkill there are great numbers of blast furnaces, rolling mills, rail mills, founderies, machine shops, and numerous other manufacturing establishments, which consume enormous quantities of the coal output of the state, and, at the same time, in every village, town, and city which abound in these regions, an immensely large industry in the buying and selling of coal for domestic consumption is also prosecuted. And what is true of the eastern end of the state is without doubt equally true throughout the interior and western portions of the commonwealth, where similar conditions prevail. Yet from no part of our great state has ever yet arisen a litigation which called in question the legality or the wisdom or the strict justice of a discrimination favorable to the manufacturing industries as contrasted with the coal-selling industries. This fact can scarcely be accounted for, except upon the theory that such discrimination, as has thus far transpired, has not been felt to be undue or unreasonable, or contrary to legal warrant. In point of fact, it is perfectly well known and appreciated that the output of freights from the great manufacturing centers upon our lines of transportation constitutes one of the chief sources of the revenues which sustain them financially. Yet no part of this income is derived from those who are mere buyers and sellers of coal. When the freight is paid upon the coal they buy, the revenue to be derived from that coal is at an end. Not so, however, with the revenue from the coal that is carried to the manufacturers. That coal is consumed on the premises in the creation of an endless variety of products, which must be put back upon the transporting lines, enhanced in bulk and weight by the other commodities which enter into the manu-

factured product, and is then distributed to the various markets where they are sold. In addition to this, a manufacturing plant requires other commodities besides coal to conduct its operations, whereas a coal dealer takes nothing but his coal, and the freight derived by the carrier from the transportation of these commodities forms an important addition to its traffic, and constitutes a condition of the business which has no existence in the business of carrying coal to those who are coal dealers only. Thus a blast furnace requires great quantities of iron ore, limestone, coke, sand, machinery, lumber, fire bricks, and other materials, for the maintenance of its structures and the conduct of its business, none of which are necessary to a mere coal-selling business. These are some of the leading considerations which establish a radical difference in the conditions and the circumstances which are necessarily incident to the two kinds of business we are considering. Another important incident which distinguishes them is that the establishment of manufacturing industries and the conducting of their business necessitates the employment of numbers of workmen, and other persons whose services are needed, and these, with their families, create settlements and new centers of population, resulting in villages, towns, boroughs, and cities according to the extent and variety of the industries established, and these in turn furnish new and additional traffic to the lines of transportation. But nothing of this kind results from the mere business of coal-selling. In fact that business is one of the results of the manufacturing business, and is not co-ordinate with it, the business of the coal dealer is promoted by the concentration of population which results from the establishment of manufacturing industries, and these two kinds of business are not competitive in their essential characteristics, but naturally proceed together, side by side, the coal selling increasing as the manufacturing increases in magnitude and extent. These considerations are generic, and are suggested for the purpose of

illustrating the differences between the fundamental conditions and circumstances of the two industries we are considering." [3]

§ 764. Such differences held illegal discrimination by other cases.

The argument in the preceding case was given at length because it was thought that the dangers of leaving such a matter to be decided upon purely economic grounds would be evident from its perusal. When all has been said, the fact of personal discrimination remains; and it is submitted that the law against personal discrimination has developed so far as to have become a positive rule for the benefit of all shippers. An excellent illustration of this within a few years was the disposition made of this problem by the Canadian Railway Commission when this problem first came before them in applying the general language against discrimination in their recent statute to this situation. The issue in one proceeding [4] was whether a lower rate on coal could be given manufacturers than was given dealers and others. The Commission held it could not sanction this, saying:

"The law is clear that the allowance of a reduction in the freight rate on any article of merchandise to one class of shippers and refusal of the same rate to another is unjust discrimination, and unjust discrimination is prohibited by the Railway Act. Common carriers are bound by every principle of justice and law to accord equal rights to all shippers who are

[3] In Missouri, K. & T. R. R. v. Trinity C. L. Co., 1 Tex. Civ. App. 553, 21 S. W. 290 (1892), the court left the question open, whether it was illegal discrimination for a railroad to fix a lower freight rate for narrow gauge cars for use of railroads engaged in the carrying business than for those intended to be used for logging purposes.

[4] Manufacturers' Coal Rates Case, 3 Can. Ry. Cas. 438 (1904). In Manufacturers Construction Material Case, 3 Can. Ry. Cas. 427 (1904), the commission foreshadowed this opinion.

entitled to like treatment both in the receiving of supplies and the shipment of their products, and a carrier who, under any pretext whatsoever, grants to one shipper an advantage which he denies to another violates the spirit and thwarts the purpose of the law. This is a statement of a conclusion arrived at by the Interstate Commerce Commission in a question very similar to the present and will be found in a case of Castle v. Baltimore & O. Ry. Co.,[5] and to this judgment and opinion this Board subscribes."[6]

§ 765. Rates to certain classes of shippers.

From what has been said it will be plain that it will usually constitute personal discrimination to give special rates to certain classes of persons upon designated sorts of goods. This complication appeared in one case before the Interstate Commerce Commission, Duncan v. Atchison, Topeka & Santa Fe Railroad Company,[7] where it was shown that under the Western Classification and tariff there were two west bound carload rates from Mississippi river points to Pacific coast terminals on goods termed "Emigrants' Moveables" (including "household goods"), one a general class rate and the other designated a "commodity" rate and less than the general rate; the latter rate was published as being open to "intending settlers only."

In this case the Commission said: "Unless within the authorized exceptions to the general rule of the statute, discriminations in charges upon like shipments of the same commodities based solely upon the purpose or 'business motive' of the

[5] 8 I. C. C. Rep. 333 (1899).

[6] In Capital City Gas Co. v. Central Vt. Ry., 11 I. C. C. Rep. 103 (1906), the Interstate Commerce Commission held that it constituted illegal discrimination to make a rate of 90 cents per ton for bituminous coal for railroad supply while charging $1.85 per ton to complainant and other consignees.

[7] 6 I. C. C. Rep. 85 (1893).

shipper, are unlawful whether affected directly or indirectly by methods of classification." [8]

§ 766. **When commodities are of different character.**

Of course different rates may be given when the commodities are not quite of the same character. This is probably the explanation of a series of cases in Kentucky justifying a difference in rate between steam coal to manufacturers and domestic coal for dealers. Thus in Commonwealth v. Louisville & Nashville Railroad Company [9] the facts shown at the trial were that the electric light company was engaged in the business of manufacturing and selling electricity; that the coal transported to it was a very low grade of coal, commonly known as "slack," and was used by the company for steam purposes; that Wade was a coal dealer in Franklin, and that the particular car load of coal on which this proceeding was based was the highest grade of coal, known as "lump"; that both were hauled in the same sort of cars, and unloaded in the same manner; that defendant's regular freight tariff on coal from Bevier to Franklin in March, 1899, was $1.50 per ton, except that on coal used for steam purposes by manufacturers, which term included gas, electric light, power, and ice companies, the rate was 30 per cent. less than $1.50 per ton.[9a]

Upon a review of the authorities cited in the note [10] the court

[8] In Smith v. Findley, 34 Kans. 316 (1885), it appeared that a low rate was given to an immigrant for a car of "household goods," but that he packed a part of the car with provisions, bacon, flour, and the like for sale. It was held that he could not do this under the circumstances. See, also, Fry v. Louisville & N. R. R., 103 Ind. 265, 2 N. E. 744 (1885), where a lower rate was quoted for commodities for "farm purposes," notwithstanding which the court enforced the bargain of the parties.

[9] 112 Ky. 783, 68 S. W. 1103 (1902).

[9a] Much the same facts appeared in Louisville, E. & St. L. C. R. R. v. Crown Coal Co., 43 Ill. App. 228 (1891).

[10] Louisville & N. R. R. v. Com., 105 Ky. 179, 48 S. W. 416 (1898); Louisville & N. R. R. v. Com., 108 Ky. 628, 57 S. W. 508 (1900); Louisville & N. R. R. v. Com., 108 Ky. 628, 57 S. W. 511 (1900).

held that "it was allowable and proper for a railroad company to classify freight according to its quality or character and marketable value; and discrimination in charges for carrying different classes or kinds is not only universally recognized, but plainly authorized by section 215. And that this settled the question since it was admitted in the pleadings and shown by proof that the respective car loads of coal upon which this action was founded were wholly different both as to quality and marketable value." [11]

§ 767. Special classes of passengers.

Granting lower rates with the customary accommodations to persons representing that they were traveling for the purpose of buying land or settling near the railroad line has been held unlawful discrimination; [12] but special rates to emigrants, riding exclusively upon "emigrant trains" with poor accommodations have been permitted. [13] This distinction is well grounded upon the difference in the cost of service to the two classes. Classifications based upon the form of contract under which passengers are carried have been sustained, as in the case of allowing to a person riding upon a commutation ticket a lower rate than that allowed to one riding upon a mileage ticket; but it is not justifiable to sell such tickets to commercial travellers at a lower rate. [14]

It has also been held that a railroad may give an especially low rate for passenger service to shippers of freight in large

[11] See Louisville & W. R. R. v. Fulgham, 91 Ala. 555, 8 So. 803 (1890), applying a statutory provision permitting reduction to be made to manufacturers to build up a community by requiring that any such reductions must be open to all manufacturers.

[12] 11 Smith v. Northern P. R. R. Co., 1 Int. Com. Rep. 611 (1887).

[13] Savery & Co. v. N. Y. C. & H. R. R. Co., 2 Int. Com. Rep. 210 (1888).

[14] Associated Wholesale Grocers v. Mo. Pac. Ry., 1 I. C. C. Rep. 393.

quantities,[15] but this discrimination seems to be the same in principle as the giving of reduced rates to large shippers, which has been above considered illegal.[16]

"In the transportation of passengers carriers are performing a public duty under franchises granted by the State, and are subject to the rules of law which require absolute impartiality to all, when the circumstances and conditions are substantially similar. The fact that their own interests may be promoted to some extent by swerving from this rule cannot be regarded as sufficient to warrant a departure from the obvious language of the Statute."[17]

[15] Inverness Chamber of Commerce v. Highland Ry., 11 R. & T. Cas. 218 (1890).

[16] § 749, *supra*.

[17] Smith v. No. Pacific R. R., 1 Int. Com. Rep. 611 (1887).

CHAPTER XXIII.

JUSTIFIABLE DIFFERENCES.

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TOPIC A—REASONABLE DIFFERENCES IN RATES.

§ 771. **Modification of the rule forbidding different rates.**

When the services asked of the carrier are essentially dissimilar the rule against discrimination is apparantly much modified. It is rightly held that different rates may be made when the cost of service is different; for to enforce equal rates under those circumstances, as has been said, would in reality be discriminatory under ordinary conditions. This is admitted even in the most extreme case against personal discrimination, Messenger v. Pennsylvania Railroad Company. [1]

"It must not be inferred that a common carrier, in adjusting his price, cannot regard the peculiar circumstances of the particular transportation. Many considerations may properly enter into the agreement for carriage or the establishment of rates, such as the quantity carried, its nature, risks, the expense of carriage at different periods of time, and the like; but he has no right to give an exclusive advantage or preference, in that respect, to some over others, for carriage, in the course of his business. For a like service, the public are entitled to a like price. There may be isolated exceptions to this rule, where the interest of the immediate parties is alone involved, and not the rest of the public, but the rule must be applied whenever the service of the carrier is sought or agreed for in the range of business or trade."

§ 772. **Rates should not be disproportionate.**

It has already been explained at much length [2] that the railway company may classify freights and passengers and charge different rates for the different classes, if there are reasonable grounds for such discrimination in the difference of the cost of

[1] 7 Vroom (36 N. J. L.), 407, 13 Am. Rep. 457, 8 Vroom (37 N. J. L.), 531, 18 Am. Rep. 754, B. & W. 357 (1874).

[2] See Chapter XVIII *passim*.

service, risk of carriage or in the accommodations furnished, or the like; but the rates must be the same for all persons and goods of the same class or else there will be personal discrimination, plainly enough.

But it will also constitute personal discrimination if different classification is given to like goods without justification. As a general rule a railway company is justified in carrying goods for one person at a less rate than that at which it carries goods for another, only where there are circumstances which make the cost of carrying the former less than the cost of carrying the latter. And moreover to be exact the difference in the rates between the different classifications of like articles must be proportionate to this difference in cost to the carrier of performing the service.

§ 773. Consideration of the cost of serving.

Upon the principles set forth in the preceding paragraph it will be plain why it is permissible to make differences in the rating of the same goods based on the nature and size of the package, large packages being given relatively lower rates than small packages. [3]

And likewise if the shipment is in a form more convenient for handling, as in casks rather than in cases, or if the freight is tendered in a form permitting a greater car load, the difference between cotton in bulk and in tightly compressed bales for example, lower rates may be given proportionate to the difference in the cost of service. [4]

"We are not unmindful of the rule which permits a common carrier to discriminate in favor of a shipper who transports large quantities of a given commodity in one parcel at a time, as against a shipper who transports the broken packages. Such discrimination is rendered necessary by the increased expense

[3] See Chapter XVIII *passim*.
[4] See §§ 571-572.

of handling, storing, and caring for the smaller quantities, and is not unreasonable." [4]

§ 774. Shippers requiring less service.

Upon similar principles it may be shown in any case that the conditions under which particular shipments are made produce such economies in handling the traffic as to justify the reductions made in the rates. An excellent case to illustrate this general doctrine is American Central Insurance Company v. Chicago & Alton Railway Company [5] where the issue was raised whether a stipulation in a contract between a railroad company and its elevator lessee by which the former was to carry the latter's grain from the elevator in car-load lots at less rate than its regular tariff, was justifiable.

In holding that this did not constitute illegal discrimination Judge Smith said: "From the face of the lease it very clearly appears that the service for which the rebate was to be allowed the lessee, and those claiming under it, was not the same nor as great as the ordinary shipper. The transient shipper furnishes no warehouse for the storage nor any supervision of his grain nor the labor necessary to handle the same, but these are supplied wholly by the carrier. Not so of the lessee of the carrier who constructs his own storehouse and also supplies at his own expense the supervision and labor necessary for the care, storage and loading of his grain, the carrier thereby escaping much expense that it must incur in case of the transient shipper. The exact provisions of the lease complained of is that the defendant will carry for the lessee in quantities not less than one full car load at one time, to other stations upon its railroad, at a rate which shall be less by one per cent. per one hundred pounds for grain in bulk, than the regular tariff price of said

[4] Louisville, E. & St. L. C. Ry. v. Wilson, 132 Ind. 517, 32 N. E. 211 (1892).

[5] 74 Mo. App. 89 (1898).

first party, or than the charges made by said first party to transient shippers who deliver grain to said first party by wagons or otherwise. It is manifest from the provisions of the lease, that the lessee was to do a large business and be a regular and constant shipper over the road of the defendant. The rebate to be allowed was not 'one per cent per one hundred pounds' below what was charged like shippers who provided warehouses and labor at their own expense to care for and handle the shipments, but the rebate was one cent one hundred pounds below what the freight cost 'transient shippers,' a totally different kind and class of shippers, who saved the defendant none of the expense of caring for or handling their shipments. We cannot for these reasons think the contract should be held invalid on the grounds of unlawful discrimination."

TOPIC B—SHIPMENT IN MORE CONVENIENT UNITS.

§ 775. Differences in the character of the service recognized.

That there are differences in the cost of service by reason of ways in which traffic is handled must be recognized; and in so far as these economies in conducting the transportation are real a proportionate reduction may be made to the shipper in question. The various phases of this problem are well set forth in the opinion of Judge Baxter, elsewhere discussed more fully.[1] "For the same reason passengers may be divided into different classes, and the price regulated in accordance with the accommodations furnished to each, because it costs less to carry an emigrant, with the accommodations furnished to that class, than it does to carry an occupant of a palace car. And for a like reason an inferior class of freight may be carried at a less rate than first-class merchandise of greater value and requiring more labor, care, and responsibility in the handling. It has been held that 20 separate parcels done up in one package, and

[1] Hays v. Pennsylvania Co., 12 Fed. 309, B. & W. 368 (1882).

consigned to the same person may be carried at a less rate per parcel than 20 parcels of the same character consigned to as many different persons at the same destination, because it is supposed that it costs less to receive and deliver one package containing 20 parcels to one man, than it does to receive and deliver 20 different parcels to as many different consignees. Such are some of the numerous illustrations of the rule that might be given."[2]

§ 776. Shipment in car loads.

The most obvious application of this rule is the relatively lower rates almost universally quoted for car load lots as compared with less than car load.[3] "Reasons that are substantial exist for making the rate lower per barrel in car load lots than in less than car load quantities. The cost of service is very considerably less in the case of shipments in car load lots than in less than car load quantities. We have had occasion to pass upon this frequently, but the evidence here requires us to do so again. The shipment by the car load goes direct to destination. It is loaded by the shipper and is unloaded by the consignee. The freight in it does not stop at the way stations to be handled in parcels to different consignees along the line. Only one bill of lading is made. It requires but one entry upon the way bill. The time occupied in transporting it to

[2] More convenient units are recognized reasons for making lower rates. Interstate Com. Com. v. Baltimore Ohio R. R., 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844, s. c. 43 Fed. 37. See, also, 2 Int. Com. Rep. 572, 729 (1892); Lotspeich v. Central Ry. & B. Co., 73 Ala. 306 (1882); Savitz v. Ohio & M. Ry., 150 Ill. 208, 37 N. E. 235, 27 L. R. A. 626 (1894), affirming 49 Ill. App. 315 (1892); Cook v. Chicago, R. I. & Pac. Ry. Co., 81 Iowa, 551, 46 N. W. 749, 25 Am. St. Rep. 512, 9 L. R. A. 764 (1890); Atwater v. Delaware, L. & W. R. R., 48 N. J. L. 58, 2 Atl. 803 (1886); Root v. Long Island R. R., 114 N. Y. 300, 21 N. E. 403, 11 Am. St. Rep. 643, 4 L. R. A. 331, B. & W. 377 (1889); Scofield v. L. S. & M. S. R. R., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846 (1885).

[3] See §§ 587-590, *supra*.

destination is far less than in the case of a shipment in less than car load quantities. There is but one collection of charges for freight.

"Where the shipment is made in less than car load quantities a separate receipt or bill of lading has to be given to every shipper for his parcel. A separate entry of every item has to be made on the way bill. The shipment is by a local freight train which stops at every station for which there is a package of freight. The freight has to be taken out in parcels and delivered at each of these stations. The freight is loaded and unloaded by the railroad company. There are as many collections of charges for freight as there are different parcels. The time occupied in transporting it is usually from two to three times as long as in the case of a car load shipment—according to distance. It occupies a whole car, and for the vacant space in that car the company is receiving no compensation." [4]

§ 777. Advantages of car load traffic.

The economies of handling freight in car load lots can hardly be overestimated. In the opinion quoted in the last section [5] it was held not unreasonable to make the rate per 100 pounds upon refined oil in less than car load lots 100 per cent. greater than the rate upon car load lots. This situation was discussed in a broad way by the Interstate Commerce Commission in a later case.[6] "The greater part of the supplies consumed upon the Pacific Coast originate twenty-five hundred miles from the point of consumption, and these supplies should be transported that twenty-five hundred miles in the cheapest manner. Waste is always expensive; if the railways are required to carry this merchandise in an extravagant manner that extravagance is

[4] Scofield v. Lake Shore & M. S. Ry., 2 Int. Com. Rep. 67 (1888).

[5] Scofield v. Lake Shore & M. S. Ry., *supra.*

[6] Business Men's L. v. Atchison, T. & S. F. Ry., 9 I. T. C. C. Rep. 318 (1901).

finally borne by the public. We have seen that the actual cost of handling this traffic in less than car loads is 50 per cent. greater than the cost of handling car loads. It seems probable, therefore, that the cheapest way in which these supplies can be taken across the continent and distributed to the consumer is by transporting them in solid car loads from the factory to the warehouse upon the Pacific Coast and thence distributing to the retailer in less than car loads, although the effect of this may be somewhat diminished by the back haul from the wholesaler to the interior point which is not performed to the same extent where goods are sent across the continent in less than car load shipments directly to the store of the retailer. It would in our opinion be unfortunate from an economic standpoint to establish a condition which would require distribution entirely or mainly in less than carload lots from the middle west."

§ 778. **Permission to mix car loads.**

Upon the principles just discussed it would seem to be permissible for the carrier to allow the shipper to send forward a mixed carload of various products since the cost of handling a mixed carload from one consignor to one consignee is not materially different from the cost of handling a carload of one commodity. But the subject has its difficulties, and the carrier is not obliged to grant this privilege. In pointing this out the Interstate Commerce Commission said:[7] "With regard to the question of allowing the same rate on mixed carloads which is given to carloads of a single product, it may be remarked that it is almost inextricably involved in the question of the rate. A rule which might work well when the load was composed of articles bearing the same rate would be very difficult to formulate where the different articles took differing rates. The ques-

[7] F. Schumacher Milling Co. v. Chicago, R. I. & P. R. R., 6 I. C. C. Rep. 61 (1893).

tions, which rates should govern; whether the highest or lowest; whether the proportion of different articles should influence the carload rate; whether the mixed rate should follow the highest or lowest class rate,—would all be involved, and it would probably be found difficult to formulate an equitable rule which should fix the rate upon such a load."

§ 779. Lower rates for shipments in bulk.

That there are often certain advantages to the carrier in shipments in bulk in car lots over shipments in packages in car lots cannot be denied. It is upon this basis that it is cheaper to handle the traffic that the railroads have felt justified in giving a lower rate per ton mile to those who ship oil in bulk in tank cars in comparison with those who ship oil in barrels in car lots. It is urged in behalf of the right of the railroads to make such differences in the rates that the different circumstances and conditions about these two modes of carrying oil fully justify these differences in the rates, viz.: the carrier furnishes the car for transporting the barrel oil, while the shipper usually supplies car and tank for carriage of tank oil, and that at a less charge for mileage than actual cost of maintenance of the car; injury to the cars used for barrel oil unfitting them for general use; larger return-empty haul on box cars used for barrel oil than on tank cars; greater risk of such goods in transit and in depot, as well as greater danger to other freights in same train and in same depot in the case of barrel oil over that of tank oil, greater cost of service in loading and unloading barrel oil to and from the cars by the carrier, when tank oil is invariably loaded and unloaded by the shipper; inability of carrier to secure insurance on cars used for transporting barreled oil, while shipper of tank oil furnishes the car and assumes all risk.[8] Such differences in the cost of the ser-

[8] See Scofield v. Lake S. & M. S. Ry., 2 Int. Com. Rep. 67, 2 I. C. C. Rep. 90 (1888).

vice should, it would seem, justify a carrier in making reasonable differences in its rates.

§ 780. Shipments in train loads problematical.

It is urged with considerable force that a railroad is justified under the rules that are now under discussion in giving a lower rate for a train load consigned from one shipping point to one point of delivery, since it cannot be denied that there is at least a slight difference in the cost of handling the traffic in train loads. But such concessions are dangerous, as it would tend to concentrate the business of the country into very few hands if a lower rate could be given to the great operator who could ship in train lots. At all events the Interstate Commerce Commission is set against such special rates for train loads in Paine Bros. & Co. v. Lehigh Valley Railroad.[9] It expressed itself thus: "We perceive no sufficient reason for different rates on carload than on cargo or train load shipments, whether the grain is carried for export or for domestic use. The principle involved in such a distinction violates the rule of equality and tends to defeat its just and wholesome purpose. That purpose is not fully accomplished if one scale of charges is applied to cargo shipments and a higher rate is imposed for single carloads, even though all cargo shippers pay the same and all carload shippers are charged alike."

§ 781. Contracts for regular shipments.

In some English cases concessions are permitted to shippers who agree to make regular shipments. The leading case for this is Nicholson v. Great Western Railway Company.[10] This was an application, under the railway and canal traffic act, for an injunction to restrain the company from giving lower rates to the Ruabon Coal Company than were given to the complainant

[9] 7 I. C. C. Rep. 218 (1897).
[10] 5 C. B. (N. S.) 366 (1858).

in that case, in the shipment of coal, in which it appeared that there was a contract between the railroad company and the Ruabon Coal Company, whereby the coal company undertook to ship, for a period of 10 years, as much coal for a distance of at least 100 miles over defendant's road as would produce an annual gross revenue of £40,000 to the railroad company, in fully loaded trains, at the rate of seven trains per week. In passing on these facts the court said that in considering the question of undue preference the fair interest of the railroad company ought to be taken into account; that the preference or prejudice, referred to by the statute, must be undue or unreasonable to be within the prohibition; and that, although it was manifest that the coal company had many and important advantages in carrying their coal on the railroad as against the complainant and other coal owners, still the question remained, were they undue or unreasonable advantages? And this, the court said, mainly depended on the adequacy of the consideration given by the coal company to the railway company for the advantages offered by the latter to the coal company. And because it appeared that the cost of carrying coal in fully loaded trains, regularly furnished at the rate of seven trains per week, was less per ton to the railway company than coal delivered in the usual way, and at irregular intervals, and in unequal quantities, in connection with the coal company's undertaking to ship annually coal enough over defendant's road, for at least a distance of 100 miles, to produce a gross revenue to the railroad of £40,000, the court held that the discrimination complained of in the case was neither undue nor unreasonable, and therefore denied the application.

But this case is much limited in later cases. Thus an agreement with certain quarry owners to carry slate for a fixed number of years at a less rate than charged for the same service to complainant quarry owners, who refused to bind themselves by such an agreement, held an undue preference.[11] And a differ-

[11] Diphwys Casson Slate Co. v. Festiniog R., 2 Nev. & Mac. 73 (1874).

ence in rates on an agreement for a period of thirty years and another agreement for fourteen years for a similar service is an undue preference.[12]

TOPIC C—FACILITIES FURNISHED BY SHIPPERS.

§ 782. Terminal facilities furnished by shippers.

It is a principal rule in this matter that it is permissible for a railroad to make a lower rate to a shipper who furnishes a part of the facilities which the carrier must otherwise provide in order to serve him. One of the leading cases in establishing this rule is undoubtedly Root v. Long Island Railroad,[1] the essential facts of which follow: In June, 1876, the defendant and one Quintard entered into a written contract, which, among other things, provided that Quintard should build at Long Island City upon the lands of the defendant a dock 250 feet long and 40 feet wide, and erect thereon a pocket for holding and storing coal, according to certain plans and specifications annexed. The defendant was to have the use of the south side of the dock, and also of 30 feet of the shore end, and the right to use the other portions thereof when not required by Quintard. In consideration therefor, the defendant agreed with Quintard to transport in its cars all the coal in carloads offered for transportation by him at a rebate of 15 cents per ton of 2,240 pounds from the regular tariff rates for coal transported by the defendant from time to time.

It was for this rebate that suit was brought, and the court decided that there was no public policy opposed to the enforcement of this contract. To quote from the opinion of Mr. Justice Haight: "Is the provision [*supra*] of the contract, therefore, providing for a rebate of 15 cents per ton from the regular tariff

[12] Holland v. Festiniog R. Co., 2 Nev. & Mac. 278 (1876).

[1] 114 N. Y. 330, 21 N. E. 403, 11 Am. St. Rep. 643, 4 L. R. A. 33, B. & W. 377 (1889).

rates, an unjust discrimination as a matter of law? Had this provision stood alone, unqualified by other provisions, without the circumstances under which it was executed explaining the necessity therefor, we should be inclined to the opinion that it did provide for an unjust discrimination; but, upon referring to the contract, we see that the rebate was agreed to be paid in consideration for the dock and coal pocket which was to be constructed upon the defendant's premises at an expense of $17,000, in part for the use and convenience of the defendant. Quintard was to load all the cars with the coal that was to be transported. It was understood that a large quantity of coal was to be shipped over defendant's line, thus increasing the business and income of the company. The facilities which Quintard was to provide for the loading of the coal, his services in loading the cars, the large quantities which he was to ship, in connection with the large sums of money that he had expended in the erection of the dock, in part for the use and accommodation of the defendant, are facts which tend to explain the provisions of the contract complained of, and render it a question of fact for the determination of the trial court as to whether or not the rebate, under the circumstances of this case, amounted to an unjust discrimination, to the injury and prejudice of others. Therefore, in this case, the question is one of fact, and not of law; and, inasmuch as the discrimination has not been found to be unjust or unreasonable, the judgment cannot be disturbed." [2]

[2] It is generally agreed that a reduction may be made to such shippers as furnish a part of the facilities necessary to serve them. See Savitz v. Ohio & M. Ry., 150 Ill. 208, 27 N. E. 235, 27 L. R. A. 626 (1894), affirming 49 Ill. App. 315 (1892); Scofield v. Lake Shore & M. S. R. R., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846 (1885); State v. Cincinnati, N. O. & T. P. Ry., 47 Ohio St. 130, 23 N. E. 928, B. & W. 400 (1890); Brundred v. Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589 (1892).

§ 783. Transportation expenses paid by shipper.

Whatever is done by the shipper which directly reduces the cost of serving him to the railroad company may be allowed for in the rate made to him without causing discrimination. One of the plainest cases of this sort is Castle v. Baltimore & Ohio Railroad Company,[3] where complainant alleged that defendant had unjustly discriminated in rates and facilities for the transportation of sand against him and in favor of his competitors; but the evidence was said to be not sufficient to show breach of legal duty on the part of the defendant; and the complaint was dismissed. Discussing the essential facts, the Commission said: "The only remaining point, and by far the most important one raised by this issue, is that involved in the alleged discriminations in favor of Brown, the complainant's competitor at Dock Siding. Brown, it appears, owned and at times leased other cars and equipment, paid the trainmen, conductors, and necessary telegraph operators, and relieved the defendant from all liability from either loss or damage to rolling stock or injury to employees; in consideration of which the defendant charged him for track service only. The complainant owned neither cars nor equipment, and when shipping in the defendant's cars was charged the published rate."

§ 784. Rental paid on shipper's cars.

If the shipper provides his own cars the railroad, it would seem clear, may allow him a reduction in his freight rate, equal to the rental value of his cars at all events. It is properly the business of the railway companies, to be sure, to supply cars for their customers; but if they stand ready to do this, they may, nevertheless, at their option make an allowance to the shipper who furnishes his own cars, which is not disproportionate to the reduced cost of serving him. Even in the extreme case of State

[3] 8 I. C. C. Rep. 333 (1899).

v. Cincinnati, New Orleans & Texas Pacific Railroad Company,[4] which is most opposed to special arrangements of this sort, this is grudgingly admitted. "No doubt, a shipper who owns cars may be paid a reasonable compensation for their use, so that the compensation is not made a cover for discriminating rates, or other advantages to such owner as a shipper. Nor is there any valid objection to such owner using them exclusively, as long as the carrier provides equal accommodations to its other customers. It may be claimed that if a railroad company permit all shippers, indifferently and upon equal terms, to provide cars suitable for their business, and to use them exclusively, no discrimination is made. This may be theoretically true, but is not so in its application to the actual state of the business of the country; for a very large proportion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, however, a shipper is not bound to provide a car."

§ 785. Difference in rates unjustifiable unless both services are offered.

The difficulty in applying these principles to particular cases is, however, considerable. Unless the railroad offers both services to all shippers alike, so that any shipper is free to choose his method of shipment, discrimination will necessarily result in favor of those who ship at the lower rates in comparison with those who are compelled to pay the higher rates. In the oil business particularly, the complaints against the differences between tank rates and barrel rates have been both loud and long, and the problem has been brought before the Interstate Commerce Commission

[4] 47 Ohio St. 130, 23 N. E. 928, B. & W. 400 (1890).

several times. In the earliest of these cases,[5] Commissioner Cooley pointed out that the argument justifying differentials although sound enough doubtless, abstractly, did not meet the actual conditions. "The most important question that arises upon the assumptions made as the basis for this argument is whether there are in fact two different modes of transportation which are offered, with their corresponding rates, equally and impartially to all shippers alike, and which it is possible for the class of persons usually engaged in the traffic freely to choose between. If no such offer is in fact made we have no occasion to follow the reasoning of the argument. Unless we wholly misapprehend the real situation, when the rate sheets of these defendants are presented to the class of persons usually engaged in the traffic, the assumption that two different modes of transportation are offered to them equally and impartially is baseless. No one of these defendants offer two modes of transportation in the same sense in which it offers its facilities for transportation to shippers of other commodities. Each of them supplies rolling stock for one method only, and that one is shown to be the method on which, by their rate sheets, the heaviest burdens are imposed. . . . It is obvious, we think, from the facts stated, that instead of the defendants offering two modes of transportation which are open to the acceptance of all, they offer only one which is open. The other is offered on such terms that it can by possibility be accepted only by parties who can control a considerable capital, and who will supply for themselves an important part of the means of transportation, and also supply terminal facilities. The man of small means who adopts the method of transportation in barrels cannot be said to do so of choice when the failure of the carrier to supply for the other the customary means of transportation compels him to do so."

[5] Rice v. Louisville & Nashville Ry., 1 Int. Com. Rep. 722, 1 I. C. C. Rep. 503 (1889).

§ 786. Various devices for giving concessions to shippers in bulk considered.

This complaint has been made to the Interstate Commerce Commission many times since this first case and the shippers have in the successive decisions received increasing protection against discrimination of the railroads of the sort here described. The Commission has insisted upon its policy that unless the railroads provide an adequate equipment of tank cars oil must be taken in barrels at the same rate as it would be taken in tank cars. roads provide an adequate equipment of tank cars oil must be made for the weight of the barrell since none is made for the weight of the tank. And itis held that in assuming for transportation purposes that a barrel of refined petroleum oil weighs 400 pounds and that a gallon of that commodity weighs 6.3 pounds when shipped in tanks, the railroads were using constructive or hypothetical weights so much out of proportion to actual weights that positive and measurable preference was granted to the shipper by the tank method; and so far as that practice enabled the tank shipper to secure the carriage of more pounds of freight for the same money than the shipper in barrels it was an unlawful prejudice. As to another scheme of giving a reduction it was held that the practice of allowing the tank shipper an arbitrtry deduction of 42 gallons per tank car is wholly indefensible, as losses from leakage and evaporation were not less proportionally when the shipment is made in barrels, and no circumstance was discovered or reason advanced which justified a concession of that nature to the shipper who furnishes his own conveyance, when no corresponding allowance was made to a rival shipper using the means of transportation provided by the carrier.[6]

[6] Rice v. Louisville & N. R. R., 1 Int. Com. Rep. 722, 1 I. C. C. Rep. 503 (1888); Scofield v. Lake Shore & Michigan Southern R. R., 2 Int. Com. Rep. 67, 2 I. C. C. Rep. 90 (1888); Re Rebate Tank & Barrel Rates, 2 Int. Com. Rep. 245, 2 I. C. C. Rep. 365 (1888); Rice v. Western N. Y. & Pa. Ry., 3 Int. Com. Rep. 162, 4 I. C. C. Rep. 131 (1891); Rice, Robinson & Winthrop v. Western N. Y. & Pa. R. R., 2 I. C. C. Rep. 389 (1888), s. c.

§ 787. Railroad must provide adequate equipment for handling shipments in bulk.

This abuse came before the judicial courts for decision not long afterward in the case of State v. Cincinnati, New Orleans & Texas Pacific Railway Company.[7] The petitions in that case charged, among other things, that the defendants misused their corporate powers and franchises by discriminating in their rates of freight in favor of certain refiners of petroleum oil by charging other shippers of like products unreasonable rates, to the injury of these other refiners and the public; and, further, that the defendants claimed and exercised, in contravention of law, the right to charge, for shipping oil in tank cars, a lower rate of freight per 100 pounds than they charged for shipping the same in barrels, in carload lots.

Mr. Justice Bradbury wrote a strong opinion against such discrimination, concluding with this sweeping language: "The duty of providing suitable facilities for its customers rests upon the railroad company; and if, instead of providing sufficient and suitable cars itself, this is done by certain of its customers, even for their own convenience, yet the cars thus provided are to be regarded as part of the equipment of the road. It being the duty of a railroad company to transport freight for all persons, indifferently, and in the order in which its transportation is applied for, it cannot be permitted to suffer freight cars to be placed upon its track by any customer for his private use, except upon the condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order that application is made, they may be used for that purpose. Were this not so, a mode of discrimination fatal to all successful

3 I. C. C. Rep. 87, s. c. 4 I. C. C. Rep. 131, s. c. 6 I. C. C. Rep. 455; Rice v. Cincinnati, W. & B. R. R., 3 Int. Com. Rep. 841, 5 I. C. C. Rep. 193 (1892); Independent Refiners' Asso. v. Western New York & P. R. R., 4 Int. Com. Rep. 63, 5 I. C. C. Rep. 415 (1892).

7 47 Ohio St. 130, 23 N. E. 928, B. & W. 400 (1890).

competition by small establishments and operators with larger and more opulent ones could be successfully adopted and practised at the will of the railroad company, and the favored shipper. The advantages, if any, to the carrier, presented by the tank-car method of transporting oil over that by barrels, in box-cars, in car-load lots, are not sufficient to justify any substantial difference in the rate of freight for oil transported in that way; but if there were any such advantages, as it is the duty of the carrier to furnish proper vehicles for transporting it, if it failed in this duty, it could not, in justice, avail itself of its own neglect as a ground of discrimination. It must either provide tank-cars for all of its customers alike, or give such rates of freight in barrel packages, by the carload, as will place its customers using that method on an equal footing with its customers adopting the other method."

TOPIC D—OTHER CONSIDERATIONS FOR REDUCTIONS.

§ 788. When consideration is given for reduction.

Abstractly it is not discrimination if one shipper pays his freight rate in money and another pays the same rate, partly in money and partly in services. This has been permitted in several cases, for example in Rothschild v. Wabash Railroad[1] where a certain reduction was allowed to certain shippers who acted as "eveners" in distributing the traffic to several railways. In permitting these facts to be shown in justification to a suit based upon this alleged discrimination, Judge Lewis said: "Suppose a railway company, instead of paying its conductor a salary, should choose to compensate his services by a percentage of the receipts from passengers traveling on his train. Suppose the conductor to purchase tickets at regular rates, for the use of members of his family, as passengers, on his train. He claims and receives his percentage on such tickets, as upon all others.

[1] 15 Mo. App. 242, affirmed in 92 Mo. 91, 4 S. W. 418 (1887).

Would it not be strangely absurd to allege that, by reason of this percentage, there is an unjust discrimination in the conductor's favor, reducing the cost of transportation to him, below what others are compelled to pay for the same facilities? The principle involved would be exactly the same that appears in the present case. Neither reason nor precedent find any injustice or unfairness in either application of it. It is sometimes a matter of judicial inquiry, whether the consideration rendered by the shipper is fairly adequate and not comparatively valueless, except as a mere device to cover up the intended favoritism of the company. But no such question is raised in the present case. For aught that appears, the undertaking and services of the 'eveners' were a fair equivalent for the percentage paid them." [2]

§ 789. **Whether indefinite considerations can be a basis.**

It may be conceded that it does not make any difference in what way the freight rate is paid, so that it appears plainly that the full rate is paid; but if some indefinite consideration on which no estimate can accurately be made to ascertain the amount of the charge is alleged, it will be dangerous to permit that to pass. Thus in the important case of Goodridge v. Union

[2] Considerations inuring to the benefit of the carrier are permitted to be shown by most courts. Union Pac. Ry. Co. v. Goodridge, 149 U. S. 680, 37 L. Ed. 986, 13 Sup. Ct. 970 (1893); Louisville & N. R. R. v. Fulgnam, 91 Ala. 555, 8 So. 803 (1890); Johnson v. Pensacola & P. R. R., 16 Fla. 623, 26 Am. Rep. 731 (1878); Chicago & A. R. R. v. Coal Co., 79 Ill. 121 (1875); Rothschild v. Wabash, St. L. & P. R. R., 92 Mo. 91, 4 S. W. 418 (1887); Hoover v. Pennsylvania R. R., 156 Pa. St. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263, B. & W. 410 (1893).

But some courts regard it as dangerous to allow this to be done. Louisville, E. & St. L. Con. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105 and note (1892); Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240, B. & W. 403 (1898); Brundred v. Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589; Fitzgerald v. Grand Trunk Ry., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70 (1891).

Pacific Railway Company,[3] the complainant demanded a refund of overcharges by reason of discrimination against him by giving a lower rate to the Marshall Coal Mining Company. The defendant railroad as part of its defense brought out that it was formerly liable to the Marshall Company to a suit for damages for an alleged trespass and to settle this suit it entered into this contract for giving this company these lower rates. But Judge Hallet said that to allow this would endanger the law forbidding discrimination. "This law cannot be controlled or defeated by any agreement between the railroad company and the favored shipper. It is true that when the consideration paid for reduced rates by the favored shipper is obviously equal to the discount allowed him, the law does not apply. Whenever that fact appears, since it matters not in what form the shipper pays the usual rates, the alleged discrimination disappears, and the contract is no longer obnoxious to the law. If, to illustrate, the damages due from the Denver & Western Company had been liquidated, and the agreement was to carry a certain quantity of coal for the amount so fixed, the question would be different. As it stands, the agreement is to give to the Marshall Company a reduced rate for certain considerations which defendant says are sufficient to make up the discount from the schedule rate; and as to that matter, the fact cannot be ascertained from the contract or otherwise. So understood it is clear that the contract affords no protection to defendant for the discrimination in rates to which plaintiffs and other shippers of coal over defendant's road are subjected. In this case no difficulty arises as to the meaning of the words 'unjust or undue discrimination' in the law. Plaintiffs and the Marshall Company are dealers in coal in the same market, depending largely on the same rates of transportation for the profits of their business. The direct effect of a reduced rate to the Marshall Company is to reduce the profits

[3] 37 Fed. 182 (1889), affirmed in 149 U. S. 680, 37 L. Ed. 986, 13 Sup. Ct. 970 (1893).

on plaintiff's coal to the extent of such reduction. The demurrer to the second defense will be sustained." [4]

§ 790. **Concessions to those who deal with the carrier.**

The dangers inherent in any permission to the common carrier to make different rates to different classes of customers requiring the same service is most apparent in a case like Louisville, Evansville & St. Louis Consolidated Railroad Company v. Wilson.[5] In that case it appeared that the railroad made high rates on cross-ties to all except one Dickason, with whom it entered into a contract giving him low rates in return for his agreement to sell it such ties as it should wish at a specified price. When this scheme was brought before the court for examination in a suit by a shipper who had suffered by this discrimination, it appeared that while he was paying $24 per car from one point to another, this Dickason was paying only $14 per car for the same transportation. The highest court sustained the instructions given in behalf of the plaintiff. A part of its opinion follows:

"Instruction No. 3, asked by the appellant, and refused by the court, was vicious, in that it was calculated to create the impression upon the minds of the jury that the contract between the appellant and Dickason did not amount to an unjust discrimination, if it was based upon an adequate consideration. If the

[4] Free transportation issued in the form of an annual pass to a person not in the regular and stated service of the carrier nor receiving any wages or salary under a contract of employment, but requested by him as compensation for throwing in its way what business he conveniently could, held to be illegal in Slater v. Northern P. R. R., 2 Int. Com. Rep. 243, 2 I. C. C. Rep. 359 (1888).

A release of liability by commercial travelers to the railroad company does not constitute a good and sufficient consideration for discrimination in fare; nor does the fact that they may influence business in favor of the road, etc. Lamson v. Grand Trunk Ry., 1 Int. Com. Rep. 369, 1 I. C. C. Rep. 147 (1887).

[5] 132 Ind. 517, 32 N. E. 311 (1892).

contract was of such a character as to destroy the business of the appellees by reason of the discrimination in favor of Dickason, and thus enable Dickason to acquire a monopoly of the business of purchasing and shipping cross-ties on appellant's road, the discrimination was unjust, without regard to the consideration upon which it was based." [6]

§ 791. Rates adopted to foster the interests of the carrier.

Despite any policy which the carrier may have in mind it must be evident that all patrons of the road have a right to adequate service at fair rates. Every producer has a right to sell his product as he pleases in the best market available, and rates must not be adopted with the idea of compelling the product to be disposed of in a way deserved by the carrier.[7] In one extreme case of this sort the railroad company refused to furnish cars for a coal miner who would not sell his coal to a coal company which was allied with the railroad.[8]

In granting a mandamus in that case Mr. Justice Dean said: "It is a refusal to carry his coal because he will not sell it at a low price to the president's coal company. As the court below, in substance, says, it was iniquitous. It, in effect, if kept up, would completely destroy his plant, with the consequent loss of his invested capital; and even if now his wrong is, to some extent, remedied, he has lost months of active business. The public duty of defendant was to carry freight and passengers. Suppose it had refused to sell him a ticket as a passenger, and no-

[6] Accord, on similar facts, Reynolds v. Western N. Y. & Pa. R. R., 1 Int. Com. Rep. 685, 1 I. C. C. Rep. 393 (1888). See, also, The Cedar Lumber Products Case, 3 Can. Ry. Cas. 412 (1903).

A pass issued for valuable consideration is usually held not discrimination. See Curry v. Kansas & C. P. Ry., 58 Kans. 6, 48 Pac. 579 (1897), and cases cited; State v. Southern Ry., 125 N. C. 666, 34 S. E. 527 (1899), and cases cited.

[7] Paxton Tie Co. v. Detroit S. R. R., 10 I. C. C. Rep. 422 (1905), accord.

[8] Loraine v. Pittsburg, J. E. & E. R. R., 205 Pa. St. 132, 54 Atl. 580, 61 L. R. A. 502 (1903).

tified him that such refusal would be kept up unless he sold his coal to the president's coal company; the wrong would have been a violation of a duty which defendant owed to the general public as a common carrier of passengers, but it would also have been a wrong special to himself, distinct from the public of which he was one, and from which he alone specially suffered. It would have been a demand on him to do something having no connection with defendant's business of transportation, and, if he refused, to deprive him of a right which, under the most solemn forms, it had undertaken to accord to him. And it is wholly immaterial that the defendant treated some shippers in the same way." [9]

[9] The free transportation of shippers or dealers between state or interstate points on account of interstate freight traffic furnished to the carrier is unlawful. Milk Producers' Asso. v. Delaware, L. & W. R. Co., 7 I. C. C. Rep. 92 (1897).

In re Boston & M. R. R., 3 Int. Com. Rep. 717 (1891), the commission left the question open whether free passes could be given proprietors of hotels, agents of ice companies, milk contractors, trustees of railroad mortgages and newspaper publishers for advertising.

TITLE II.

Undue Preference in Service.

CHAPTER XXIV.

DISCRIMINATION BETWEEN DEPENDENT SERVICES.

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§ 801. Discrimination in regard to dependent services.

The general problem is whether in dealing with dependent services the common carrier is under the usual obligations of the public service law or whether the common carrier is free to deal with them as it sees fit, consulting only its own interests. So close is the argument and so recent is its origin that there has been, and there remains, a square conflict of authority as to whether this law extends so far as to cover this situation. On one side are the jurisdictions conservative in attitude, which hold that there is no public duty involved and that therefore, the carrier may, for example, discriminate among expressmen. On the other hand, are the progressive jurisdictions which hold that there is a public obligation involved and that the carrier may not, therefore, admit certain hackmen to its station while excluding others. And in various other subsidiary businesses of the same sort, where those who offer a service to the public are dependent to a considerable extent for opportunity to conduct their calling upon obtaining privileges from the carrier, there will be found the same issue and the same controversy. Much is said upon both sides; and in a matter of such commercial consequence much of this is worth repeating. The discussion is carried on along the whole line; not only is the matter discussed from the point of view of the proper theory to be held, whether the general rules of public service govern or whether they are inapplicable; but the matter is also discussed with much heat from the point of view of public policy and business convenience.

TOPIC A—SUBORDINATE CARRIERS OF GOODS.

§ 802. **Duty toward expressmen considered.**

At the beginning of the controversy as to the position of subordinate carriers of goods both sides admit that to the extent to which a common carrier has made public profession covering a given line of business he is bound to serve all that apply without discrimination. Here is the first difficulty, as the case of expressmen shows: It may be established that the usual course of dealing between the railroad companies and the express companies has been upon the basis of special contract; on the other hand, it may be shown that the railways have universally made some provision for handling express matter. This is so clear that it may be asserted that the modern railroad owes some duty in respect to the transportation of small and valuable parcels safely and quickly. But to whom is this duty owed? It hardly seems to be to the expressman or other subordinate carrier, for the railroad could plainly carry on these branches of the transportation business for the general public, and it could then exclude all others from the route. Therefore, the duty that it owes seems to be rather to the general public who ship through the expressmen. "An express company engaged in the business of transporting small packages has as good a right to the benefits of the railroad as the owners of the packages possess in person. It is impossible that they can all appear in person to claim their rights, and it is sufficient that they are represented by agents who are intrusted with their goods, and have a special property in them."[1]

§ 803. **Express companies: conservative view.**

The leading authority upon the subject is certainly the Express Cases.[2] This is the general heading covering several

[1] Per Lewis, C. J., in Sandford v. Catawissa R. R., 24 Pa. St. 378, 64 Am. Dec. 667 (1855).

[2] 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. 542, 628, B. & W. 157 (1886).

suits presenting substantially the same question, as they were all suits begun by expressmen against railways to compel them to give them respectively the express facilities on the several lines of railway which they had previously enjoyed by contract and of which they had been dispossessed by notice given in accordance with the terms of exclusive contracts made with favored companies. Judgments below had been rendered in favor of the express companies from which the railroad companies appealed. The cases were elaborately argued; and the whole history of the course of dealings that had gone on between the express companies and the railroad companies was discussed. The decision of the majority of the court went off upon this evidence. Mr. Chief Justice Waite concludes the majority opinion thus: "It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines. In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practical moment, to take one express company on some or all of their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement. By the terms of their

contracts they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding, and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights." [3]

§ 804. Express companies: radical view.

It is admitted by both sides to this controversy that the modern railroad company owes a duty in respect to express matter to the general shipping public. Thereupon, it will be maintained by one side that if the railroad makes provision for the transportation of express matter by entering into an arrangement with an expressman to carry on the business along its route, it thereby fulfills its duty; and that it may, therefore, make an exclusive contract if it pleases, although that involves discrimination. But it may be answered from the other side that this argument carried to its logical conclusion leaves the public without protection.

[3] Accord: Pfister v. Central R. R., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404 (1886); Louisville v. New Albany & C. R. R., 146 Ind. 21, 44 N. E. 796, 58 Am. St. Rep. 348, 38 L. R. A. 93 (1896); Sargent v. Boston & L. R. R., 115 Mass. 416 (1874); Atlantic Express Co. v. Wilmington & W. R. R., 111 N. C. 463, 16 S. E. 393 (1892).

This is governed by statute in some jurisdictions; for example, to-day in Massachusetts by statute, such number of local expressmen shall be permitted to operate over a given route as the railroad commissioners shall decide. See Rev. Laws chap. 111, sec. 241.

To bring out the difference of opinion upon this important matter it may be well to give at some length, one of the leading cases upon the other side of this controversy. The most radical decision upon this side is to be found in McDuffee v. Portland and Rochester Railroad.[4] This was an action on the case by the plaintiff, an expressman, against the defendant railway for not furnishing the plaintiff terms, facilities, and accommodations for his express business on the defendants' road between Rochester, N. H., and Portland, Me., reasonably equal to those furnished by the defendants to the Eastern Express Company. The defendants demurred to the declaration, which demurrer the Supreme Court finally discharged. The gist of Chief Justice Doe's opinion may be seen from the following extract:

"A railroad corporation, carrying one expressman, and enabling him to do all the express business on the line of their road, do hold themselves out as common carriers of expresses; and when they unreasonably refuse, directly, or indirectly, to carry any more public servants of that class, they perform this duty with illegal partiality. The legal principle, which establishes and secures the common right, being the perfection of reason, the right is not a mere nominal one, and is in no danger of being destroyed by a quibble. If there could possibly be a case in which the exclusive arrangement in favor of one expressman would not be an evasion of the common-law right, the question might arise whether, under our statute law, public railroad corporations are not common carriers (at least to the extent of furnishing reasonable facilities and accommodations of transportation on reasonable terms) of such passengers and such freight as there is no good reason for their refusing to carry.[5]

[4] 52 N. H. 430, 13 Am. Rep. 72, B. & W. 149 (1873).

[5] Accord: New Eng. Exp. Co. v. Maine C. R. R., 57 Me. 188, 2 Am. Rep. 31 (1868); Sanford v. Catawissa R. R., 24 Pa. St. 378, 64 Am. Dec. 667 (1855).

"The business of carrying what is called "express matter" has recently grown up, and is productive of great public advantage. The objection to

§ 805. Discussion of these conflicting views.

The strongest argument for the progressive view may be developed from the principles laid down in the opinion just quoted. If the public duty in this matter does not go to the extent of preventing discrimination in performing it, none of the law of public service applies between the railroad company and the express company; and it follows that any express company may be charged extortionate prices. Such unreasonable charges, if not forbidden, will inevitably react upon the general shipping public to whom, by the hypothesis, a public duty is owed to provide adequate service for reasonable rates. It may be urged at this stage that since the express business itself is a public calling, therefore, the express companies themselves are bound to give satisfactory service at reasonable rates. But their duty is relative; if they cannot get adequate facilities they are not bound to provide them; and if they must pay extortionate prices they may charge these against the general shipping public as necessary operating expenses. If the Express Cases are law, there is no limit upon the amount which the railroad may charge the express company and no way by which the reaction of that charge upon the shipping public may be avoided. This seems to reduce the doctrine of the Express Cases[6] to an absurdity; if, as those cases decide, there is no public duty owed from the railways to the expressmen, then it is because of that gap impos-

carrying such matters, on the ground of the novelty of the business, has nothing in it deserving serious consideration. If all the improvements of this progressive age are to be excluded from railroad transportation because they were not in existence when the charters were granted for the roads, the public would soon be deprived of the chief value of these important works. The law is not so unreasonable in its constructions. The rights of express agents or carriers have been fully recognized in this respect in England. They are entitled to equal benefits with others, and no exclusive advantages can be granted to others to their injury. Pickford v. G. J. Ry., 10 M. & W. 397; Parker v. G. W. Ry., 7 M. & G. 253; Parker v. G. W. Ry., 11 C. B. 545, 583." Lewis, C. J., in Sandford v. R. R., *supra*.

[6] 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. 542, 628, B. & W. 157 (1886).

sible in any way entirely satisfactory to protect by the law the shippers of express matter from the machinations of those who are concerned with transporting it.

The arguments from policy that are urged in these conservative cases are not conclusive, although they have a certain force. It is true that it is somewhat more difficult for the railroads to handle three distinct expresses than one, but not more difficult than many problems of railroading that are part of every day traffic handling. Subdivision of express cars upon light runs, and more development of the special train for express matter, would solve the difficulty; and the railroad is protected in any event by the right to charge a fair price for its services based upon the cost of service. Again, it is said that large express companies are better than a greater number of smaller companies. It should be pointed out, however, that the doctrine of the Express Cases[7] may be used to exclude the national express companies with their full equipment from any railroad system, the directors of which favor some local company.

§ 806. Exclusive contracts with private car lines.

The doctrine of the Express Cases [8] is continually hampering the common law in dealing with interstate transportation. Within the last few years public opinion has been much aroused against the exclusive arrangements entered into between the railways and the various private car lines. It is pretty generally agreed that what ought to be done in dealing with the private car lines is to apply to the whole situation the coercive law that regulates public calling. Either the railways ought to be obliged to conduct these special services themselves, furnishing their own cars, or if they decide upon a different policy they should be obliged to haul the cars of as many private car lines as choose to undertake the business. But the conservative doc-

[7] *Supra.*

[8] 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. 542, 628, B. & W. 157 (1886).

trines held by the Supreme Court of the United States stand in the way of the immediate application to interstate commerce of any such progressive views as these. In the meantime, in the absence of efficient regulation by thorough-going law, those private car lines that have exclusive agreements with the railways are showing very clearly what may happen when a common carrier is permitted to foster a monopoly in a dependent service.

§ 807. Refrigerator car lines.

The private refrigerator car lines have been the subject of especial complaint. Finally, the Interstate Commerce Commission, upon complaints made by various shippers and consignees, instituted an investigation into the matter, the results of which are reported under the heading, *Re* Transportation of Fruit.[9]

It was shown that the respondent railroad companies, the Pere Marquette and the Michigan Central, had entered into contracts with the other respondent, the Armour Car Lines, to furnish the refrigerator car service for the transportation of fruit over their lines, that under these contracts the use of any other car service was prohibited, and that the icing during transportation was to be exclusively performed by the car company. Further, it was proved that following after the making of this arrangement the cost of refrigerator car transportation increased from fifty to one hundred and fifty per cent. The commission held that it was the duty of the railroad companies either to provide cars proper for this service or to enter into arrangements whereby this service would be provided. Under the doctrine of the Express Cases[10] it felt bound to hold that exclusive contracts of this sort might be entered into. But in its final recommendations the Commission nevertheless suggested that if outrageous extortion resulted from this plan some redress might

[9] 10 I. C. C. Rep. 360 (1905).

[10] 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. 542, 628, B. & W. 157 (1886).

be given, saying: "It appears that the Armour Car Lines Company—and that is Armour & Company—already has a practical monopoly of the fruit carrying business under refrigeration from Michigan. We know from former investigations that this is also true in some other sections of the country; and this monopoly may finally become general. All this is a matter of no concern to the public so long as the service is good and the charge reasonable; but the establishment of a general monopoly might result in poor service, just as it has in this section already resulted in exorbitant charges. For this reason it is urged that the Railway Companies ought not to be permitted to make exclusive contracts with private car lines like those under consideration, but should be compelled to provide their own equipment. The facts before us call for no expression of opinion on that subject, and none is attempted." [11]

§ 808. **Live stock transportation companies.**

Similar issues have been raised as to private car lines for the transportation of live stock; but the federal courts have applied the doctrine of the express cases to them as in duty bound. The leading case on this point seems to be United States ex rel. Morris v. Delaware, Lackawanna & Western Railroad Company.[12]

To an application for a mandamus to compel a carrier to transport relators' stock in the cars of a certain live stock transportation company, the respondent set forth in its return that it had entered into a contract with another transportation company, by which that company was to furnish respondent a certain number of cars per year; that such cars were available to all shippers of stock; that they were much more useful to de-

[11] In Rogers L. T. M. Wks. v. Erie Ry., 20 N. J. Eq. 379 (1869), the defendant railroad company entered into an arrangement with a locomotive express concern for the handling of all locomotives offered it for transportation. It was held that plaintiff, a shipper of locomotives, could object to this scheme.

[12] 40 Fed. 101 (1889).

fendant than other live stock cars, in that they could be converted into coal-cars when not used for live-stock; that defendant paid mileage for the use of cars; and that for all of these reasons, the respondent railroad was justified dealing exclusively with the Lackawanna Live Stock Express Company and in refusing to enter into relations with the American Live Stock Transportation Company, the co-relator. In holding the defense of the defendant railroad sufficient, Judge Wallace said: "It is no part of the common-law obligation of railway companies to furnish the same facilities or instrumentalities of transportation to all alike, and while it is unquestionably their duty to furnish suitable and adequate facilities for all reasonable necessities of the business they engage in, they may nevertheless choose their own appropriate means of carriage. This was the doctrine of the Express Cases,[13] in which it was held by the Supreme Court that railroad companies are not required by usage, or by the common law, to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled. But the Interstate Commerce Act requires them to treat all impartially, and if one shipper is subjected to any undue or unreasonable prejudice or disadvantage because a railway company permits another shipper to use his own cars for carrying traffic over its road, their right to choose their own appropriate means of carriage is to that extent curtailed."[14]

[13] 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. 542, 628, B. & W. 157 (1886).

[14] Citing Burton Stock Car Co. v. Chicago, B. & Q. R. Co., 1 Int. Com. Rep. 329, 1 I. C. C. Rep. 132 (1887). See, also, Nicholson v. Great Western R. Co., 5 C. B. N. S. 366 (1858); Cooper v. London & Southewestern, 4 C. B. N. S. 454 (1857). See, however, Shamberg v. Delaware, L. & W. R. R., 3 Int. Com. Rep. 502, 4 I. C. C. Rep. 630 (1891).

TOPIC B—DEPENDENT PASSENGER SERVICES.

§ 809. **Duty toward hackmen considered.**

In the preceding topic the right of those who were conducting a dependent freight service was found to rest in last analysis upon the public duty owed by the common carrier to the shipping public. In this topic the duty of the common carrier in its dealings with those who are conducting a dependent passenger service will be considered, and the hypothesis is brought forward that the duty in such cases is related to the general rights of the traveling public. One of the most bitter controversies within this general dispute is over the right of a railway company to exclude all but certain favored hackmen from its station grounds. It is admitted by all, that a railroad owes such duties to its incoming and outgoing passengers that it cannot exclude from its station driveways hackmen bringing passengers, or hackmen directed by passengers to call for them; for, of course, no one, upon reflection, would go so far as to deny the duty of the carrier of passengers to permit free access and egress for those whom it is serving.[1]

§ 810. **Cases permitting discrimination between hackmen.**

Notwithstanding this, it is maintained by many courts that the railroad company is under no public duty to admit hackmen to its station grounds to solicit business. One of the strongest cases for the railway in this matter is the New York, New Haven & Hartford R. R. Co. v. Scoville.[2] In that case it appeared from the complaint that the plaintiff by its board of directors adopted a regulation excluding from its station grounds all persons who, without special permission in writing,

[1] In the following cases, among others, it was held that at all events hackmen bringing passengers or coming for passengers on special order must be admitted: Griswold v. Webb, 16 R. I. 649, 19 Atl. 143 (1889); Summit v. State, 8 Lea (76 Tenn.) 413, 41 Am. Rep. 637 (1881).

[2] 71 Conn. 136, 41 Atl. 246, 71 Am. St. Rep. 159, 42 L. R. A. 157 (1898).

should come to solicit the carriage of passengers or their luggage. The defendant, knowing the regulation, soon afterwards entered upon its station grounds in Middletown to solicit business of that description. This was a bill for an injunction to stop this practice. The injunction was granted in the lower court, but the higher court set this aside.

Mr. Justice Baldwin held that the main question to be determined was whether the regulation was reasonable; saying that it rested primarily within the discretion of the company: "In regulating matters of this kind, a wide discretion is necessarily entrusted to the managers of the railroad. They are in a situation which should make them the best judges of what promotes the comfort of those who ride upon their road. Courts will always be slow to pronounce unreasonable any rule purporting to be directed toward that end, which they have deliberately adopted. It appears from the complaint that the station grounds at Middletown are sufficiently large to allow the establishment there of a public stand at which to ply the carriage and express business, and also that an exclusive privilege for maintaining such a stand there has been granted by the plaintiff to a third party. Such a grant was within its lawful powers, provided its terms were not inconsistent with the reasonable accommodation of the passengers upon its road. Nothing appears on the record to indicate any such inconsistency. It may well be more convenient for them to deal with a single local carrier than to be met, on alighting from their train, by importunate solicitations from a number of rival competitors for their custom; and, in the absence of averments to the contrary, it is to be presumed that the prices at this stand are fair, and the service sufficient. If any of them prefer that of some other person, they can secure it by an order in advance, which would justify his entrance on the grounds; or by passing by the stand established there, and going into the streets outside, to engage whomsoever they think fit. It follows that the defendant had no right to

enter the Middletown station grounds for the purpose of soliciting business."[3]

§ 811. **Cases forbidding discrimination between hackmen.**

On the other hand, the position that a railroad may not admit favored hackmen to solicit business upon the station grounds and exclude other hackmen from equal privileges is held in many cases. The argument for this view is stated very clearly in State v. Reed.[4]

From the agreed statement of facts it appeared in that case that there was in connection with the railroad station in the city of Vicksburg a considerable enclosure; that the railroad company had granted to one Perue exclusive privilege of entering the station grounds in order to solicit passengers; and that hackmen kept thereby outside the enclosure were,

[3] *United States*—Donovan v. Pennsylvania Co., 199 U. S. 272, 50 L. Ed. 000, 26 Sup. Ct. 91 (1905), affirming 124 Fed. 1016, 60 C. C. A. 168, 120 Fed. 215, 116 Fed. 907.

Connecticut—New York, N. H. & H. R. R. v. Scoville, 71 Conn. 136, 41 Atl. 246, 71 Am. St. Rep. 159, 42 L. R. A. 157 (1898).

Georgia—Kates v. Atlanta Bag. & Cab. Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431 (1898).

Massachusetts—Old Colony R. R. v. Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661, B. & W. 166 (1888); Boston & A. R. R. v. Brown, 177 Mass. 65, 58 N. E. 189, 52 L. R. A. 418 (1900); Boston & M. R. R. v. Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275 (1900).

Minnesota—Godbout v. Union Depot, 79 Minn. 188, 81 N. W. 835 (1900).

New Hampshire—Hedding v. Gallagher, 72 N. H. 377, 57 Atl. 225 (1903), overruling on rehearing 59 N. H. 650.

New York—Brown v. New York C. & H. R. R. R., 151 N. Y. 674, 46 N. E. 1145 (1897); New York C. & H. R. R. R. v. Flynn, 74 Hun, 124, 26 N. Y. 859 (1893); New York C. & H. R. R. R. v. Sheeley, 27 N. Y. Supp. 185 (1893); New York C. & H. R. R. R. v. Warren, 64 N. Y. Supp. 781, 31 Misc. Rep. 571 (1900).

Ohio—Snyder v. Depot Co., 19 Ohio Cir. Ct., 368 (1899); State v. Union Depot Co., 71 Ohio St. 379, 73 N. E. 633 (1905).

Rhode Island—New York, N. H. & H. R. R. v. Bork, 23 R. I. 218, 49 Atl. 965 (1901).

[4] 76 Miss. 711, 24 So. 308, 71 Am. St. Rep. 528, 43 L. R. A. 134 (1898).

therefore, at great disadvantage. One Reed, a hackman, was arrested for trespassing within the enclosure contrary to the public prohibition made by the railroad company.

Mr. Chief Justice Woods held that the action of the court below in discharging Reed was correct; he summed the matter up thus: "The question is one that affects the interests of the public. The upholding of the grant of this exclusive privilege would prevent competition between rival carriers of passengers, create a monopoly in the privileged hackmen, and might produce inconvenience and loss to persons traveling over the railroad, or those having freights transported over it, in cases of exclusion of drays and wagons from its grounds, other than those owned by the person having the exclusive right to enter the railroad's depot grounds. To concede the right claimed by the railroad in the present case would be, in effect, to confer upon the railroad company the control of the transportation of passengers beyond its own lines, and to create a monopoly of such business, not granted by its charter, and against the interests of the public." [5]

§ 812. Discussion of the duty toward hackmen.

There is again plainly no public duty owed by the railways to the hackmen. The hackmen are not asking for transportation

[5] *Florida*—Indian River S. B. Co. v. East Coast Transp. Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258 (1891).

Illinois—Pennsylvania Co. v. Chicago, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223 (1899).

Indiana—Indianapolis U. Ry. v. Dohn, 153 Ind. 10, 53 N. E. 937, 74 Am. St. Rep. 274, 45 L. R. A. 427 (1899).

Kentucky—McConnell v. Pedigo, 92 Ky. 465, 18 S. W. 15 (1892).

Michigan—Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194, 47 N. W. 667, 22 Am. St. Rep. 693, 10 L. R. A. 819 (1890).

Mississippi—State v. Reed, 76 Miss. 211, 24 So. 308, 71 Am. St. Rep. 528, 43 L. R. A. 134 (1898).

Missouri—Cravens v. Rodgers, 101 Mo. 247, 14 S. W. 106 (1890).

Montana—Montana W. Ry. v. Langlois, 9 Mont. 419, 24 Pac. 209, 18 Am. St. Rep. 745, 8 L. R. A. 753 (1890).

nor are they paying rates. And, *ultra vires* aside, the railways might, if they chose, establish a cab service of their own for the further transportation of their passengers, and in connection therewith they might exclude all rival carriages from soliciting patronage in their stations. Nor could the hackmen complain if they were all confined behind a bar in an appropriate part of the station, for this would be a reasonable regulation for administering the facilities for the general benefit of the passengers. But a regulation which arbitrarily admits one line of hacks to the station and excludes another is a different matter and whether this is valid or not depends upon whether it is consistent with the general duty of the carrier or not.[6]

There seems, however, to be a violation of the duty owed by the carrier to the passenger to permit free egress by these special privileges at the station which prevent the passenger from having equal access to all who wish to put themselves at his disposal. The right of the passenger to have ingress to the station by any carriage that he chooses to employ nobody dares to deny; it is very hard to see any essential difference from the obligation to give egress without discrimination. Moreover, to allow the grant of exclusive privilege permits the exploitation of the passenger by this monopoly; for monopoly price is always higher than competitive price; as may be shown by the fact that the favored lines are always willing to pay roundly for the exclusive privilege, even when maximum fares are fixed by local ordinance.

[6] In the following cases, among many others, reasonable regulations governing carriage stands at railway stations were held valid upon the ground that no discrimination was involved: Cole v. Rowan, 88 Mich. 219, 50 N. W. 138, 13 L. R. A. 848 (1891); Smith v. New York, L. E. & W. R. R., 149 Pa. St. 249, 24 Atl. 304 (1892).

§ 813. Hauling sleeping cars.

A case since the express cases which came up for decision in the Supreme Court of the United States really involves the same general issue — Chicago v. Pullman Southern Car Co.[7] The facts so far as they are material to the present issue are these: An exclusive contract was entered into between a railroad company and a palace-car company whereby the latter company was to have the exclusive right for fifteen years to furnish parlor and sleeping-cars on all passenger trains of the railroad company, the railroad company binding itself not to contract with any other company to run the same class of cars over its lines during that period. Now, if this be considered an arrangement within a field not covered by public duty there is really no objection to such a transaction; for such arrangements for exclusive dealings between two private parties are properly not considered objectionable. But if there is a public duty in the premises then such a contract should be held void as against public policy.

The court disposed of the case by denying that there was any public duty to take on competing lines of palace-cars. An extract from the opinion of Mr. Justice Harlan follows: "The defendant was under a duty arising from the public nature of its employment to furnish for the use of passengers upon its lines, such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing-room and sleeping-cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendants' lines were supplied with the requisite num-

[7] 139 U. S. 79, 35 L. Ed. 97, 11 Sup. Ct. 490 (1890).

ber of drawing-room and sleeping-cars, it was a matter of indifference to the public who owned them."[8]

The argument for the conservative view is undoubtedly put most attractively when it is phrased in terms of public duty. It is squarely averred in this case, and in others which follow its line of thought, that the duty to the public is fully performed when the railroad makes provision for the subordinate service by entering into an arrangement with an independent company to do it, and that the public stand indifferent as to who shall serve them, provided that service is offered. This argument has the force and weakness of half-truth. All this is so; and yet if public duty plays no part in governing the arrangement between the railroad company and the palace-car company the public may without illegality be made subject to an exorbitant price by reason of the exaction of an outrageous fee for the monopoly; while, if public duty governs the railroad in entering into this arrangement, it must accept as many palace-car companies as care to take the risk of entering into this business upon paying a fair charge for haulage. There would never, in fact, be much actual competition under such circumstances; but there would always be the benefit to the public which results from potential competition.

§ 814. Favoring certain eating houses.

The point has been raised a few times whether there is a duty in respect to the provision of food for passengers. In Kelly v. Chicago, Milwaukee & St. Paul Railroad[9] it appeared that the railroad had arranged with the plaintiff to have a dining-room near the station premises at Sanborn Station where trains were stopped for meals. Later, another arrangement was made with other parties at Spencer Station, twenty-seven miles distant; in

[8] *Accord*, Worcester Excursion Car Co. v. Pennsylvania Ry., 2 Int. Com. Rep. 792, 3 I. C. C. Rep. 577 (1890).

[9] 93 Ia. 436, 61 N. W. 957 (1895).

this latter contract the railroad agreed to transport supplies free, and to furnish fuel. Thereafter, the train schedule allowed for meals at Spencer instead of Sanborn. Plaintiff in this action alleged these discriminations.

The court decided in favor of the railroad. Mr. Justice Deemer said: "We are not inclined to commit ourselves to the doctrine that because a railroad company carries freight free of charge to one of its eating-houses, and furnishes the proprietor with fuel, ice, and transportation for his family and his employes, it is bound to do so for all without reference to the contractual relations existing between them." [10]

The public duty here, again, is to the traveling passenger; for it cannot be denied that those who carry passengers over long distances owe them the duty to make provision for food for them. The rule is thus stated in Peniston v. Chicago, St. Louis Railroad Company,[11] by Mr. Justice Poche: "In conveying passengers through long journeys, such as from Chicago to New Orleans, at great speed and with rapidity, a common carrier is required by humanity, as well as by law, to provide its passengers with easy modes and to allow them reasonable time for the purpose of sustaining life by means of food and necessary refreshments. Hence it is that on all such roads arrangements are made to enable passengers to obtain at least two meals a day, and that announcement is made in every passenger train by employes of the road of the approach of a train to a station where, under arrangements with the company, meals are prepared for the convenience of passengers."

There may be seen in this instance again, the conflict of opinion between the two schools of thought, the first finding no duty in respect to food supply, the second insisting that there is a duty. If the prices charged for food should be outrageous

[10] It may be claimed with some truth that Perth General Station Committee v. Ross, 1897, A. C. 479, is to the same effect.

[11] 34 La. Ann. 777, 44 Am. Rep. 444 (1882).

there ought to be redress; and it should be pointed out again that any monopolistic arrangement tends toward higher prices.

§ 815. **Treating baggage transfer men with equality.**

This question, whether access to the station may be granted exclusively to one baggage-transfer line and altogether denied to others, is another case under the general problem. There is upon this issue, therefore, the same bitter controversy; some jurisdictions would permit the exclusion of all but the favored line, while others would allow equal access to all.

On one side it may be said, as before, that there is no direct duty owed by the company to the baggage-transfer lines or any of them; and that, therefore, the railroad may make any discriminations that it pleases. For, as is pointed out in the principal cases cited below if there is no public duty in the matter, a public-service company may bestow its favors as it pleases; and to many courts it seems that the railways may deal as they please with the baggage-transfer people.[12]

On the other hand, in many other jurisdictions it would certainly be held that the general duty owed by the railway company to its passengers to allow them free egress from its station, involved the duty to allow them free access within the sta-

[12] Such is the doctrine of the following cases:

Connecticut—New York, N. H. & H. R. R. v. Scoville, 71 Conn. 136, 41 Atl. 246, 71 Am. St. Rep. 159, 42 L. R. A. 157 (1898).

Georgia—Kates v. Atlanta Bag. Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431 (1899).

Massachusetts—Old Colony R. R. v. Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661, B. & W. 166 (1888).

Minnesota—Godbout v. Union Depot, 79 Minn. 188, 81 N. W. 835 (1900).

New Hampshire—Hedding v. Gallagher, 72 N. H. 377, 57 Atl. 225 (1903).

New York—Brown v. New York C. & H. R. R. R., 151 N. Y. 674, 46 N. E. 1145 (1897).

Rhode Island—New York, N. H. & H. R. R. v. Bork, 23 R. I. 218, 49 Atl. 965 (1901).

Virginia—Norfolk & W. Ry. v. Old Dominion Bag. Co., 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722 (1901).

tion to those who might wish to put themselves at their disposal to aid them in getting their belongings away.[13]

The most elaborate case upon this point is Kates v. Atlanta Baggage & Cab Company.[14] In that case it appeared, first, that the defendants permitted the cab company to enter the passenger trains before reaching the city, for the purpose of soliciting baggage, and refused the same privilege to the petitioner; second, that the servants of the cab company were allowed access to the passenger station for the purpose of soliciting patronage and for more conveniently attending to its business, and this privilege was refused to petitioner; third, that the privilege of using an office in the baggage room of the defendants for the transaction of its business was granted to the cab company and refused to Kates; fourth, the privilege of checking the baggage of prospective passengers at hotels and residences in advance of delivery of the baggage at the passenger-station was given the cab company—each of which privileges was refused to petitioner.

The court held all of these justifiable; but it would seem that some distinctions should be taken. The first and fourth privileges it would seem to be permissible for the railroad to grant exclusively, as these are special favors not absolutely necessary for the conduct of the dependent service, the need of the pas-

[13] Such is the doctrine of the following cases:

Florida—Indian River St. B. Co. v. East Coast Trans. Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258 (1891).

Indiana—Indianapolis U. Ry. v. Dohn, 153 Ind. 10, 53 N. E. 937, 74 Am. St. Rep. 274, 45 L. R. A. 427 (1899).

Kentucky—McConnell v. Pedigo, 92 Ky. 465, 18 S. W. 15 (1892).

Michigan—Kalamazoo Hack & Bus Co. v. Sootsuma, 84 Mich. 194, 47 N. W. 667, 22 Am. St. Rep. 693, 10 L. R. A. 819 (1890).

Missouri—Craven v. Rodgers, 101 Mo. 247, 14 S. W. 106 (1890).

Montana—Montana W. Ry. v. Langlois, 9 Mont. 419, 24 Pac. 209, 18 Am. St. Rep. 745, 8 L. R. A. 753 (1890).

Mississippi—State v. Reed, 76 Miss. 211, 24 So. 308, 71 Am. St. Rep. 528, 43 L. R. A. 134 (1898).

[14] 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431 (1899).

senger being at the station only.[15] It is otherwise as to the second and probably as to the third, for it is submitted that at the station the passengers should be given equal access to all transfer companies who wish to deal with them.

§ 816. Granting concessions for private businesses.

It is obvious that the outside limits of this public duty which the common carrier owes in respect to dependent services have now been reached. So long as there was a question of the right of shippers in respect to the transportation of their goods, there was a public duty in the premises; and while it could be said that the service was one concerning adequate facilities for passengers, the public duty existed. Within these lines there should be neither exploitation nor discrimination; but beyond these conditions the common carrier should remain free to carry on its own business in its own way. For example, as it owes no duty to passengers to see to the provision of flowers, magazines, cigars and souvenirs, it may grant exclusive privileges for the sale of these articles upon its trains; and so it may grant in a station exclusive rights to barbers and bootblacks. "The business of selling lunches to passengers, or of soliciting from them orders for the same, is not one which every citizen has the right to engage in upon the tracks and premises of a railway company, and consequently those who do engage in it and carry it on must depend upon the company for the privilege."[16] In street cars, likewise, advertising rights may be given to one and refused to another, and certain newsboys may be allowed to sell papers while others are not. All these are more than the adequate facilities that the law requires to be provided by the common carrier to its patrons. And this may be shown by the fact that none of these trades which have just been mentioned are so affected

[15] Lewis v. W. W. & N. W. R. R., 36 Tex. Civ. App. 48, 81 S. W. 111 (1900).

[16] Fluker v. Georgia R. R., 81 Ga. 461, 2 L. R. A. 843 (1889).

by a public interest as to be held public employments. In Audenried v. Philadelphia & Reading Railroad Company,[17] the question was as to the right of the defendant company to so parcel or divide its wharf among other coal dealers as to exclude the complainant therefrom. After expressing great doubt as to whether the defendant, under its charter, was bound to provide wharf accommodations to any of the coal dealers in question, or was a trustee to any extent for them, the court adds: "Transportation by a common carrier is necessarily open to the public upon equal and reasonable terms. An exclusive right granted to one is inconsistent with the rights of all others. This was not transportation, but wharfage, the nature of which requires exclusive possession temporarily."

TOPIC C—PRIVILEGES AT FREIGHT TERMINALS.

§ 817. Special privileges at freight terminals.

The situation at freight terminals is analogous to the situation at passenger terminals; and as might be expected, there is conflict of authority in relation to the duties of common carrier in dealing with those who wish to serve owners of goods at freight terminals. It would probably be generally agreed that the railroad may undertake these incidental services itself, and if it does so it may exclude all others from conducting the service. But if the railroad does not care to undertake the service itself then the difficult question will arise again whether it may enter into an exclusive contract with one concern for the performance of these services, or whether such an exclusive contract constitutes an illegal discrimination against other people who would willingly undertake the service in competition. Upon this general problem more evidence is adduced in the sections immediately following.

[17] 68 Pa. St. 370, 8 Am. Rep. 195 (1871).

§ 818. **Arrangements with stockyards.**

The relative positions of the railroads and the stockyards have been discussed already at some length. Thus it has been seen that although the decision at first was otherwise, it is now held that there is no duty owed to the owner of cattle to make special delivery of them at any place along the line that he wishes. Consequently it is held that the railroad may designate certain points of delivery reasonably convenient as it may of other freight which it has undertaken to carry. Upon this basis the courts have been willing to permit the railroad to designate one of several stockyards as its cattle station in effect, where it will deliver cattle consigned to that point and have accordingly justified it in refusing to deliver at other stockyards. This was well enough so long as the court held strictly that no charge could be made under such circumstances against the shipments for yardage if the consignee was ready to take the cattle away. But under the latest decisions the courts have permitted the stockyards company to make an additional charge as a connecting carrier might. It would seem, therefore, that there is present danger in the situation that the railroad will not fulfil its duty, which is to deliver everything it carries, as it ought. And should it persist in handing its patrons over to stockyards, with whom it has exclusive arrangements, the danger of exploitation which has been discussed earlier in this chapter will become apparent. Wherever the duty to the shipping public is involved the general rule that there must be no discrimination comes into play.[1]

[1] For the convenience of the reader the principal cases in this sequence that have come before the judicial courts are cited below: Coe v. Louisville & N. R. R., 3 Fed. 775, B. & W. 251 (1880); Covington S. Y. Co. v. Keith, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. 461, B. & W. 256 (1891); Butchers & D. S. Y. Co. v. Louisville & N. R. R., 67 Fed. 35, 14 C. C. A. 290, B. & W. 262 (1895); Walker v. Keenan, 73 Fed. 758, 19 C. C. A. 668 (1896); Interstate Com. Com. v. Chicago, B. & O. R. R., 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824 (1904); and Central S. Y. Co. v. Louisville & N. R. R., 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339 (1905).

§ 819. **Contracts with grain elevators.**

As to grain elevators at terminals, the rule is established, as has been already pointed out, that the railroad must deliver to all of them that are along its route. Grain in bulk is a peculiar kind of freight, which as a commercial matter requires special delivery. And as this is a duty owed by the railroad to its patrons, it would not be legal for it to make a discrimination in favor of one grain elevator requiring its patrons to receive grain consigned to them through it and pay to its proprietor his fixed charges.[2]

"May such railroad companies, in like manner, discriminate between grain elevators in the same place,—constitute one elevator its depot for the delivery of grain, and force competing interests to receive from and transfer the grain consigned to them through such selected and favored channel? If railroad corporations possess such right, they can destroy a refractory manufacturer, exterminate, or very materially cripple competition, and in large measure monopolize and control these several branches of useful commerce, and dictate such terms as avarice may suggest. We think they possess no such power to kill and make alive. Impartiality in serving their patrons is an imperative obligation of all railroad companies; equality of accommodations in the use of railroads is the legal right of everybody. The principle is founded in justice and necessity, and has been uniformly recognized and enforced by the courts. A contrary idea would concede to railroad companies a dangerous discretion, and inevitably lead to intolerable abuses. It would, to a limited extent, make them masters instead of the servants of the public."[3]

[2] The quotation which follows is from Baxter, Circuit Judge, in Coe v. Louisville & N. R. R., 3 Fed. 775, B. & W. 251 (1880).

[3] But see Richmond v. Dubuque R. R., 26 Iowa, 191 (1886), where it was held that an agreement between a railroad company and an elevator company that the latter should have the handling of all grain passing over their road did not constitute a monopoly.

§ 820. Access to connecting steamboats.

An analagous question is raised when a railroad having a terminus upon a wharf in a navigable stream, enters into some arrangement with one steamboat line whereby it may have exclusive access to the wharf. In the Indian River Steamboat Co. v. East Coast Transportation Company,[4] the scheme employed was this: The Indian River Steamboat Company leased from the Jacksonville, Tampa & Key West Railway Company, 390 feet of the east end of its dock on the Indian River, at Titusville, on which dock was located the railroad track and terminal facility of the railroad company; and the railroad company covenanted, and agreed in the lease, to maintain the railroad track on said dock and bulkhead and to furnish exclusive facilities for transfer of local freight to and from the bulkhead. The bill asked for an injunction to restrain respondents, a rival steamship line, from using this dock at Titusville.

Mr. Justice Mabry wrote the opinion of the court. He said in one place: "The real question presented here is, can complainant corporation, engaged in carrying freight and passengers on the Indian River by means of steamboats, rent from a railroad common carrier its dock on said river, on which its track and terminal facilities are located, and exclude others from landing at said terminal point for the purpose of receiving freight and passengers to and from said common carrier? This question, we think, must be answered in the negative. If it be competent to sustain such a contract, the common carrier can select one connecting line of boats, and exclude all others from doing business with it. Such a doctrine would lead to the legalizing of a monopoly, and the sanction of an unfair and unjust preference between connecting and competing lines of transportation. We do not understand that a common carrier ever had such power as this."[5]

[4] 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258 (1891).

[5] Accord: Mason D. & S. R. R. Co. v. Graham & W., 117 Ga. 555, 43 S.

The principal case seems sound in every particular if one accepts the progressive view in dealing with this problem; but if one adopts the conservative view it is difficult to see why the decision must not be the other way. And it seems that such a result would be unfortunate; since, by force of such an exclusive arrangement, the railroad might turn its patrons over to the favored company and demand what price it pleased for fostering this monopoly. And again, if this were legal, there would seem to be no way to prevent the steamboat company from charging this terminal expense against the shipping public. In some instances, perhaps, this exclusive arrangement might stand, as if it were all one line operated by one system, competing steamboats might be excluded from the intermediate wharf.

§ 821. No access owed except at wharf stations.

It should be said, however, that, as no access or egress is owed, except at established stations, by a railroad to its patrons, the only legal wrong in such discrimination against connecting steamboats at terminal wharves will be at such wharves as are regular stations. This was the deciding point in the final decision in Ilwaco Railway and Navigation Company v. Oregon Short Line Railway Company,[6] where the Circuit Court of Appeals held that a transportation company operating a railway and a line of steamboats connecting at the company's wharf is not required, by the 3d section of the Interstate Commerce Act, to permit the boats of a competitor to land at such wharf. For, as Mr. Justice McKenna pointed out: "The contention of complainant is not that defendant's facilities are inadequate, but that it is excluded from them. The exclusion,

E. 1000 (1903); Alexandria B. Sb. Co. v. New York C. & H. R. R. R., 45 N. Y. Supp. 1091 (1897).

[6] 57 Fed. 673, 15 U. S. App. 173, 6 C. C. A. 495, B. & W. 275 (1893), overruling 51 Fed. 611 (1892).

however, only consists in the prevention of the landing of its boats at defendant's wharf. We have probably said enough to indicate out views of this, but we may add that the wharf does not seem to be a public station. It is a convenience, only, in connecting its railroads and boats; the general station being at Ilwaco, where ample facilities exist." [7]

§ 822. **Rights of competing draymen.**

On analagous principles to those discussed in regard to baggage transfer it would seem that the railroad may not permit certain draymen to have access to its freight houses to cart goods to consignees, and refuse all access to other carters. For example, if a consignee sends to a freight house for his freight by a drayman of his own selection, it should be clear that the railroad would act contrary to its duty if it refused such a drayman access to the goods. On the other hand, it may be granted that if the carrier chooses to extend its route in effect by undertaking personal delivery of freight to the consignee at his address, it might do this by its own carts and men and need not employ in that service all who wish to engage in it. But whether, if it offers delivery beyond its own route to its patrons, and to that end enters into an exclusive contract with one line of drays to perform this service, the owners of other drays may complain if they are excluded from offering their services to shippers in this behalf, is the question of the duties of a common carrier in dealing with a dependent service presented in still another form. The Federal courts, as might be expected, see nothing wrong in such an arrangement. The point is thus made in St. Louis Drayage Company v. Louisville and Nash-

[7] See Louisville & N. Ry. Co. v. West Coast N. S. Co., 198 U. S. 483, 49 L. Ed. 1135, 25 Sup. Ct. 745 (1905), overruling 121 Fed. 645 (1903), where it was held that if a railroad provided adequate wharfage facilities, it might at a particular wharf exclude all but one line. See, also, Gulf C. & S. F. Co. v. Miami S. S. Co., 86 Fed. 407 (1900).

ville Railroad Company,[8] where the facts involved the issue which has just been raised. In that case Mr. Justice Phillips said: "It was essential that, in selecting a company for the transfer of its freights between St. Louis and East St. Louis, it should secure one fully equipped for doing the business,—solvent and reliable. It could not afford to take chances in so grave a matter. It might be unsafe to trust to the caprice of competing transfer companies, or to sporadic rivalries. It could not foresee how long it would be before the railroad company, in such dependence, might find itself a prey to a 'combine' among the transfer companies, or become exposed to the not improbable contingency of a rivalry between competing companies, which would break both down, leaving the railroad company without a certain, reliable connection with the city. It would be harsh, unreasonable, and questionable legislation that would deny to the common carrier the protection of a provident, reliable contract, like the one in question. It was essential to a reliable and permanent arrangement that the transfer company should establish and maintain sufficient warehouse buildings for the reception and storage of freights collected from the city of St. Louis, and that the company with which it contracted should have ample facilities and equipments to successfully carry out such connecting arrangement. All this, the evidence shows, was represented in the business character, standing, and capital of the transfer company, which, without disparaging the business character of the younger company, it is not too much to say, the defendant would not find in the plaintiff company to the extent presented in the transfer company. So long as the public enjoys the advantages of the competition between the defendant company and other railroad companies, in securing through rates for freights to competitive points, it is of no concern to the public that the plaintiff drayage company cannot share equally in the business of the de-

[8] 65 Fed. 39 (1894).

fendant company. Especially so when the plaintiff makes no showing of any benefit to the shipper by admitting it to equal facilities with the transfer company."

§ 823. **Permitting installation of telephones.**

A most interesting modern instance of the problem arose before the Canadian Board of Railway Commissioners, reported as the Telephone Case.[9] It appeared in that case that an arrangement had been entered into between the Canadian Pacific Railway and the Bell Telephone Company by which the telephone company was to have the exclusive right to place instruments in the railway stations. A rival telephone system was therefore excluded from installing an instrument in a railway station.

The majority of the tribunal held that there was nothing illegal in giving such an exclusive right; but a minority held for the applicants. An extract from each view is given herewith as the case is of first impression. Bailey, J., for the majority, said: "If it be said that the Bell Company has a monopoly, the question may fairly be asked, 'What does their monopoly consist of?' Certainly not of the telephone business. There is nothing to prevent telephone companies from being established in any locality where a company with means sufficient for the purpose may choose to locate. The extent of their monopoly so far as affects the present application is the right to have their phones in the railway station on railway premises. The only difference between the Bell Company and any other company is that the railway company's agent may be reached directly by subscribers by phone, other companies not having a phone in the station may reach him indirectly by their agent most conveniently located. There is, therefore, no monopoly of the business of telephony; there is no monopoly of the information which the railway officials have to furnish for the general public; there will be no material difference in the expense of maintaining

[9] 3 Can. Ry. Cas. 203 (1904).

him; so that, so far as I can discover, the general interests of the public are not prejudicially affected."

Commissioner Mills, dissenting, said in part: "In all these cases, however, one thing is clear, viz.: that the fundamental and guiding principle is the public interest, and that no restraint upon trade or restriction upon legitimate business in any part of the country, should be regarded as reasonable and in harmony with public policy, unless it can be clearly shown that it does not interfere or tend to interfere with the rights and interests of the public in that locality. It may be said that an exclusive privilege, such as that in the telephone agreement, does not interfere with the public interest, because the public will be better served by a strong, well-equipped organization, such as the Bell Telephone Company, than it would be served if free competition were allowed. That may or may not be so. One thing we know, viz.: that this is the argument of all monopolists. We know, also, that, generally speaking, the people are the best judges of their own interests; and, on a well-established principle of government in free countries, they should be allowed to decide such questions for themselves—whether to depend wholly on an organization such as the Bell Telephone Company, or to establish a municipal system of telephones for their own use."[10]

§ 824. Fostering monopoly in public services.

There have been brought forward now the principal arguments for the conservative view and the chief reasons for the progressive view upon each distinct instance that has arisen under the general problem of the public duty of the common carrier in dealing with the dependent services. Those who argue for the conservative position are prone to rest their case upon practical convenience, assuring us that only if the common carrier be left to deal with these dependent services, as the

[10] Compare Cumberland Telephone & Telegraph Co. v. Morgan's Louisiana R. R., 51 La. Ann. 180, 24 So. 803 (1899).

situation may demand, can these diverse problems be successfully solved in particular cases. But that the monopoly system may be found to work well in particular instances, does not alter the fact that there is real danger in leaving the carrier wholly without the restraint of law, and able, therefore, to exploit those whom it is his duty to serve. The time has long since passed when *lazzez faire* may be put forward as the better method of dealing with the public services; and any concession, such as so many courts are willing to make in these instances, that there is no law to be found to restrain the common carriers in dealing with the dependent services, is a survival from that older policy now outgrown in respect to virtual monopolies.

But even if the common carrier at times exercises his discretion by seeing to it that the dependent service is provided under fair conditions, the danger remains in leaving this important situation without law; for if there is abuse of discretion and those who need the dependent service are systematically exploited, then there will be no law in reserve by which redress is possible. And if experience in dealing with the public service companies is teaching anything, it is showing that only the most comprehensive law will prove effectual; for if a way of escape is left, it will be found. Therefore, it is to be hoped that the progressive program in dealing with this special problem of the relation between the principal service and the dependent service will be the one that will prevail.

TOPIC D—CONNECTING CARRIERS.

§ 825. **Discrimination between connecting carriers.**

One other form of discrimination ought to be discussed in this chapter, and that is differences made by one carrier between rival carriers which connect with it. With some one of these the carrier enters into a contract of one sort or another for through routing to some degree, but it refuses to give some of these privileges, or all of them, to the other. This is, of course,

illegal discrimination only to the extent that public duty is involved so that the preliminary question is as to the extent of the duty of a railroad in dealing with connecting railroads. May it refuse altogether to have dealings with them, to accept goods from them or to deliver goods to them? Obviously, this will not do; it is the duty of the railroad as a common carrier to accept of any consignor or deliver to any consignee, whether it be a railroad or a person. On the other hand it can hardly be said that the railroad must accord to all railroads every special privilege that it gives one railroad in a joint traffic agreement; for what it does for one as a favor, another cannot demand as a right. The truth of this matter must therefore lie between these two extremes.

§ 826. Goods requiring further transportation.

A common carrier must accept all goods properly tendered to it; however strained the relations between two carriers may be, the first carrier may tender goods received from a shipper to the second carrier; and the second carrier must accept these goods and forward them to their destination; for the first carrier in reality is offering the goods to the second carrier as agent of the shipper, to whom it is plain the public duty in the matter is owed.[1]

Although one line tendering goods as agent for the shipper may demand whatever the shipper might demand, if acting through any other agent, it cannot demand more. In Southern Indiana Express Company v. United States Express Company[2] the plaintiff company complained that the defendant company refused to take parcels from it for further transportation without prepayment of charges, while for allied lines it not only did not require prepayment but even advanced back charges. The plaintiff claimed that this discrimination was a denial of its

[1] Beers v. Wabash R. R., 34 Fed. 244 (1888).
[2] 88 Fed. 659 (1898).

public duty. But Mr. Justice Baker held: "There is no principle of the common law requiring a common carrier receiving articles of trade and commerce from a connecting line to advance or assume the payment of the charges accrued thereon for the transportation of such articles from the point of origin to the connecting line. If it does thus pay or assume such accrued charges, it can retain a lien upon the property transported for their payment as well as for the payment of the charges due to itself for such transportation. An express company, like any other common carrier, has a right to demand that its charges for transportation shall be paid in advance, and is under no obligation to receive goods for transportation unless such charges are paid if demanded. Nor is such express company under any obligation to pay to the tendering company the charges due to it for its services in transporting such articles of trade and commerce from the point of origin to the point of tender. It is true that the general practice is to collect the charges upon delivery of the goods to the consignee, and, when goods are received without payment in advance being demanded, it becomes the duty of the carrier to transport them to their destination, or to deliver them to the next receiving carrier. Receiving the goods for transportation without any demand for prepayment of charges constitutes a waiver of such right. The carrier holds a lien upon the goods for payment of charges, and, in case of a delivery of them to the consignee before payment, it can hold him responsible therefor. The same rule applies whether the articles of trade and commerce are received from the original consignor or from a connecting carrier. An express company, in the absence of contract, is under no obligation to receive and transport for the original consignor, or to continue the transportation for a connecting carrier, without the prepayment of its charges if demanded. The furnishing of equal facilities, without discrimination, does not require a common carrier to advance money to all other carriers on the same terms, nor to give credit for the

carriage of articles of trade and commerce to all carriers because it extends credit for such services to others."[3]

§ 827. Transportation in the same cars.

As to whether transportation must be given to the goods offered by a first carrier to a second carrier in the cars in which they are tendered by the first carrier, regardless of the desires of the second carrier, there is some conflict of authority. In Oregon Short Line and Utah Northern Railroad Company v. Northern Pacific Railroad Company[4] the law and fact of this matter were by Mr. Justice Field summarized thus:

"As the receiving company is under no obligation to take the freight in the cars in which it is tendered, and transport it in such cars, when it has cars of its own, not in use, to transport it, there can be no custom that it shall pay the owner of such cars, should it receive them in such case, car mileage for their use. The car mileage in that case must be upon an arrangement between the parties. But when the receiving company takes the freight in the foreign cars because it has none of its own out of use to transport it, or because it would injure the freight to transfer it to its own cars, it is the general practice for the receiving company to pay the usual mileage on the cars taken and used, and such practice is a reasonable one, and should be enforced."[5]

[3] Citing Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co., 9 C. C. A. 409, 61 Fed. 158 (1894); Id., 51 Fed. 465 (1892); Little Rock & M. R. Co v. St. Louis S. W. Ry. Co., 11 C. C. A. 417, 63 Fed. 775 (1894); Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed. 559 (1890).

[4] 51 Fed. 465 (1892).

[5] The use of cars upon other lines is a service incidental to the receiving, forwarding and delivering of traffic, and is within the provision of the English Act. Niphwys Casson Slate Co. v. Festiniog R. Co., 2 Nev. & Mac. 73 (1858).

Where cars are dissimilar in character a railway company may refuse to forward, upon reasonable requirements. Caledonian R. Co. v. North British R. Co., 3 Nev. & Mac. 56 (1862).

§ 828. Such transportation held obligatory.

On the other hand there are several cases, most of them based upon statute, which hold that the railroad is obliged to accept the cars of another road filled with goods and carry them through to their destination. Thus, in an opinion written by Mr. Justice Cooley, in the case of Michigan Central Railroad Company v. Smithson,[6] is the following statement: "The primary fact that must rule this controversy is that the Michigan Central Railroad Company is compelled to receive and transport over its road all the varieties of freight cars which are offered to it for the purpose, and which are upon wheels adapted to its gauge. It is compelled to do so, first, because the necessities of commerce demand it. It cannot and would not be tolerated that cars loaded at New York for San Francisco, or at Boston for Chicago, should have their freight transferred from one car to another whenever they passed upon another road. Time would be lost, expense increased, injuries to freight made more numerous, and no corresponding advantage accrue to any one. It is compelled to do so, second, by its own interest. To attempt to stop every car offered to it at its termini, that the freight might be transferred to its own vehicles, would be to drive away from its line a large portion of its traffic, and compel it to rely upon a local business."[7]

§ 829. Through traffic agreements.

The principal question in this topic is whether, if a railroad enters into through traffic arrangements with one railroad, it is

[6] 45 Mich. 212, 7 N. W. 791 (1881).

[7] See, to the same effect:

Louisville & N. R. R. Co. v. Boland, 96 Ala. 626, 11 So. 667 (1892); Baldwin v. Railroad, 50 Iowa, 680 (1878); C., B. & Q. R. Co. v. Curtis, 51 Neb. 442, 71 N. W. 42 (1897); Vermont & M. R. R. v. Fitchburg R. R., 14 Allen (Mass.), 462 (1867); Macklen v. Boston & A. R. R., 135 Mass. 201 (1887); Thomas v. Mo. Pac. Ry. Co., 109 Mo. 187, 18 S. W. 980 (1892).

bound to do so with others in the same situation. In the leading case in the United States Supreme Court, Atchison, Topeka and Santa Fe Railroad v. Denver and New Orleans Railroad,[8] it was squarely held that a railroad might enter into through traffic agreements with one railroad, pro rating its through rate, and at the same time refuse to enter into a similar agreement with another railroad traversing the same territory as the first and having the same terminus. To quote but one paragraph from the elaborate opinion of Chief Justice Waite: "At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work."

§ 830. Through arrangements compelled.

In some states, however, under authority of statute, through arrangements may be compelled by the body which has general power of the services and rates of the companies. The question has been raised whether such statutes are constitutional, but there seems to be little doubt.[10] In holding such a Minnesota statute valid Mr. Justice Collins said: "We see no reason why, under the amendatory act (Gen. Laws 1895, chap. 91), the commission cannot lawfully compel a joint arrangement in

[8] 110 U. S. 667, 28 L. Ed. 281, 4 Sup. Ct. 185, B. & W. 265 (1884).
[10] State v. Minneapolis & St. L. R. R., 80 Minn. 191, 83 N. W. 60 (1900).

a case like this. The evidence shows that the location of the Duluth road and the Minneapolis and St. Louis road, their track facilities, equipment, etc., are such that, by operating together under joint traffic agreements, the cost of the service can be greatly lessened. The public has, at least, a right to share in the benefits of this condition. If it is judicious so to do and of public benefit to have joint traffic arrangements in any given case, why should not the public be permitted to compel that such arrangements be made?" "If the state is to have any voice, therefore, in the establishment of reasonable rates, it must have a voice in some degree and some manner in the business of the carrier. Where a single carrier is being dealt with, this can be accomplished by determining what the operating expenses ought reasonably to be; the reasonable value of the capital invested; what return, under all the circumstances of the case, would be fair; and then, by adjusting the rate, an economical management is secured. But in a case like the one at bar, where each may plead its inability to make the necessary agreement with the other, the state must have the power to arbitrate between them, and, within proper limitations, compel the acceptance of its award." "If the state is powerless to decide as between carriers, we have, as said by counsel for the commission, the following absurdity, namely: '(a) The state may regulate rates; (b) the rate must be reasonable; (c) it must afford the carrier compensation over and above operating expenses; (d) the method of operating and consequent expenses is beyond the state control.' But this question has heretofore been considered and disposed of in this state adversely to defendant's contention in Jacobson v. Railroad Company.[11] It was there held that the act of 1895 did not, under the facts of that case, contravene the federal or the state constitution when conferring upon the commission the power to compel the transfer and interchange of loaded cars, and

[11] 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389 (1898), affirmed 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. 115 (1900).

the making of joint rates for through shipments, where the haul was in part on one, and in part on the other, of two connecting roads. There are no facts here which take this case out of the operation of the rule thus established, and we must abide by it as perfectly legitimate, until the federal court declares that an error has been committed. We hold, therefore, Laws 1895, chap. 91, is constitutional."

CHAPTER XXV.

DISCRIMINATION BETWEEN LOCALITIES.

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TOPIC A—DISCRIMINATION BETWEEN LOCALITIES AT COMMON LAW.

§ 831. Locality has no right to complain of rates at common law.

At common law the carrier deals with individuals, not with cities or towns, and no one but a person has a right to complain that rates are too high. Except under a statute, a city or locality or the citizens in general cannot complain of the rates charged by a carrier. At common law the wrong, if any, is against the individual shippers at the various stations. They may complain if the rates charged them are unreasonable.

While discrimination in rates between individuals is illegal, even if the higher rate is reasonable in itself, this is not true as to discrimination between localities. If a general rate charged to all shippers in a certain place is reasonable in itself it is not rendered illegal merely because shippers in another place are charged a lower rate.

§ 832. Discrimination as evidence that the higher charge is unreasonable.

When, however, a rate between two points is attacked by an individual shipper as unreasonable in itself, as evidence in support of the complaint he may show that rates are lower for a similar haul between other points.[1]

[1] State v. Minneapolis & S. L. Ry., 80 Minn. 191, 83 N. W. 60 (1900); Cordele Machine Shop v. Louisville & N. R. R., 6 I. C. C. Rep. 361 (1895).

"In determining what would be fair and equitable rates to Norfolk a comparison of population and of rates and distances between eastern points and Norfolk and Columbus may be of some advantage. The two cities are located about 50 miles apart, Columbus being a little east of a north and south line through Norfolk. By the census of 1900 the population of Platte County, in which Columbus is located, was 10,542, while the population of Madison County, in which Norfolk is located, was 9,255. The population of Columbus was 3,522, and that of Norfolk was 3,883. The former is the junction point of the Union Pacific and Burlington roads, and the latter the junction of the C., St. P., M. & O. and the F., E. & M. V. roads. The railway distances from eastern points are as follows:

Chicago	to	Norfolk,	586 m.	Chicago	to	Columbus,	550 m.
Omaha	"	"	119 "	Omaha	"	"	91 "
Lincoln	"	"	134 "	Lincoln	"	"	75 "
Sioux Cy.	"	"	74 "	Sioux Cy.	"	"	126 "

The rates between Chicago and Norfolk, however, are considerably higher than between Chicago and Columbus, and the difference furnishes an indication of the extent to which we regard the Norfolk rates as excessive. In other words, taking all the facts and circumstances into account, the reduction which we think should be made would give Norfolk the same Chicago rates as Columbus now enjoys."[2]

Except so far as it has an evidentiary bearing on the reasonableness of the rate in question, rates to other places or from other points of shipment are not material at common law.[3]

§ 833. **Weight to be given to such evidence.**

How much weight shall be given to such evidence must, of course, depend on the facts of each case. When rates to Dan-

[2] Yeomans, Com. in Johnson v. Chicago, S. P., M. & O. Ry., 9 I. C. C. Rep. 221, 244 (1902).

[3] Interstate Commerce Commission v. Louisville & N. R. R., 73 Fed. 409 (1896).

ville were in question the Court gave considerable weight to rates charged for similar hauls. "Whether or not the Danville rates are reasonable *per se* is a question that has given me no small amount of trouble. That the cost of transporting freight by wagons is not a proper test is very clear. The rates at Lynchburg cannot be alone used as a basis of comparison. The criteria to which I think the greatest weight should be given are as follows: The opinions of expert witnesses; the effect of the present rates on the growth and prosperity of Danville; the cost of transportation as compared with the rates charged; and the rates in force at numerous other cities, where the circumstances are as nearly similar as may be to those prevailing at Danville. . . . The inconclusive and unsatisfactory results, and the inherent difficulties in applying the above-mentioned tests, have led me to the conclusion that the most satisfactory test to be applied in this case is to compare the Danville rates with those in force at numerous other cities and towns in the South, where the circumstances are as nearly as may be similar to those at Danville. This has been done by numerous witnesses for the defense. The rates to and from a great number of towns and cities in the South—some larger and some smaller, some of more and some of less commercial importance, than Danville; some inland and some having water as well as rail transportation; some being on only one railroad and some having more than one road—have been shown. The result of comparisons between these rates and the Danville rates is the conclusion that the latter compare favorably with the former. It may be said that the rates used for comparison are themselves unreasonably high. But the expert witnesses for the defense—who alone testify on the point—are of opinion that they are not; and, if it be true that they are unreasonably high, evidence to this effect should have been introduced by the complainant. Again, it may be true that there are many cities in the South that are fairly to be compared with Danville, the rates at which are much lower than the Dan-

ville rates. But, if so, no evidence to this effect has been introduced." [4]

§ 834. **Lower rate as evidence of unreasonableness of higher.**

In the case of Interstate Commerce Commission v. East Tennessee, Virginia and Georgia Railway,[5] in the Circuit Court, Judge Severans expressed the strong opinion that a less rate for a longer haul tended to prove the higher rate unreasonable.

"It is assumed in argument by counsel in making defense that the rates to Chattanooga are just and reasonable in themselves. This, it is said, is conceded, and upon the premises it is urged, in substance, that the public at Chattanooga has no right to complain if the respondents lower their rates to Nashville. In one sense, this is true. But the suggestion is fruitful of other considerations. The question whether the rates are just and reasonable in themselves is in some measure a relative one; that is to say, it may be tested by a comparison of the particular rates with those accepted elsewhere for a similar service, and whether the instances thus employed are or are not such as by their relation to the case in hand are subject to the operation of some other provision of the commerce act, is immaterial. Besides, I think the question of the justness and reasonableness of rates under the first section is colored by the other provisions of the law, and by the general policy of the whole enactment, which is to effect the equality of charges. And, at all events, it seems to me clear that the charges accepted for a longer haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul. Such comparisons are applied to every other kind of business, and the fact that there may be competition in such business would not be a controlling consideration, for the presumption would always be that the com-

[4] Quoted from McDowell, Dist. J., in Int. Com. Commission v. Southern Ry., 117 Fed. 741 (1902).

[5] 85 Fed. 107 (1898).

pensation charged for the service or thing is sufficient to be reasonable. The presumption is not, of course, a conclusive one, but would seem a fair one, in the absence of special circumstances. It is not according to my understanding that it is conceded that the rates to Chattanooga are just and reasonable in themselves."

In that case the Supreme Court[6] did not pass upon the reasonableness of the lower rate in itself on the ground that the Commission had not done so. But in that and other cases the Supreme Court has carefully refrained from expressing an opinion as to the extent to which the Commission might use the lower rate as evidence of the unreasonableness of the higher rate.

§ 835. Higher rate not necessarily unreasonable.

On the other hand, it has been held that a comparison of rates between two places is not of itself enough to justify the conclusion that the higher rate is unreasonable, even if the difference is not explained by the carrier.

"The bill in this case charges that the rates charged by the appellees on goods shipped from St. Louis and Tennessee points to Hampton, Fla., are unreasonably high in themselves, in violation of section 1 of the act to regulate commerce. As we read the opinion of the Commission, filed as an exhibit to the bill, the Commission did not find that the Hampton rates were in and of themselves unreasonable, but found argumentatively that they were too high, not as based upon the matters to be considered in determining such questions, as pointed out in United States v. Freight Association,[7] and Smyth v. Ames,[8] but largely upon a consideration of rates and charges between St. Louis, Nashville and Chattanooga, and Jacksonville and Palatka, Fla. The evidence submitted to the Commission, supplemented by evidence

[6] East Tennessee V. & G. Ry. v. Interstate Commerce Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516 (1901).

[7] 166 U. S. 331, 17 Sup. Ct. 540, 41 L. Ed. 1007.

[8] 169 U. S. 546, 547, 18 Sup. Ct. 418, 42 L. Ed. 819.

taken in the Circuit Court, is not sufficient for us to find affirmatively that the Hampton rates were in and of themselves unreasonable. The Commission furnishes the authority for the proposition that with regard to the exaction of unreasonable rates the burden of proof is on the complainant.[9] Certainly, the complainant has failed in this instance to prove that the Hampton rates were in violation of the first section of the Interstate Commerce Act." [10]

§ 836. What circumstances may be considered.

Unlike circumstances which will justify discrimination are circumstances connected with the traffic over the line on which the discrimination is made. "If the respondent is acting, or claims to act, under the compulsion of circumstances and conditions of its own creation or connivance in the making of an exceptional rate, then these will not avail it."[11] Therefore where goods were offered to a carrier at Mobile it could not charge more than the Mobile rate, on the ground that the carriage of the goods really originated at another place and had been brought from there by a cheap conveyance instead of by a carrier with whom the present carrier had a traffic arrangement;[12] and the same thing is true in the case of carriage of passengers.[13]

§ 837. Elements affecting cost of service at one point.

The comparison between two points may be affected by other circumstances besides competition, so as to prove a discrimina-

[9] See Harding v. C., St. P., M. & O. R. Co., 1 I. C. C. Rep. 104 (1887); Brewer v. L. & N. R. R. Co., 71 I. C. C. Rep. 234 (1897).

[10] The quotation is from Pardee, J., in Interstate Com. Com. v. Nashville, C. & St. L. Ry., 120 Fed. 934 (1903).

[11] Business Men's Assoc. v. Chicago, S. P., M. & O. R. R., 2 Int. Com. Rep. 41, 2 I. C. C. Rep. 52 (1888).

[12] Bigbee & W. R. Packet Co. v. Mobile & O. R. R., 60 Fed. 545 (1893).

[13] Bennett v. Dutton, 10 N. H. 481, B. & W. 105 (1839).

tion between them reasonable. Thus where on one of the hauls there are heavier grades than on the other comparison fails.[14] So where expensive terminal facilities must be provided at one of the points.[15] And the volume of traffic and the possibility of back freights will also affect the problem.[16]

TOPIC B—UNDUE PREFERENCE OF LOCALITIES UNDER STATUTE.

§ 838. General principles of statutory regulation.

But though discrimination between localities is not illegal at common law, it is not infrequently made so by statute; and it is well to examine the question in some detail in order to reach a proper understanding of the statutory provisions. The rule does not forbid all differences between localities, but such only as are undue or unreasonable; for the statutes general have a saving clause respecting dissimilar conditions and circumstances.

The general principle may be thus expressed in one brief paragraph. "It is insisted that these differentials give an undue preference for the reason that they are without excuse or justification. If the assumption of fact embraced in this statement is true, the conclusion probably follows. A preference without legitimate excuse would be in and of itself an undue and unreasonable one."[1]

It follows from what has just been said[2] that: "A disturb-

[14] Bellsdyke Coal Co. v. North British Ry., 2 Ry. & Can. Tr. Cas. 105 (1858); Nitshill Coal Co. v. Caledonian Ry., 2 Ry. & Can. Tr. Cas. 39 (1858).

[15] Rice v. Western N. Y. & P. R. R., 2 I. C. C. Rep. 389 (1888).

[16] New Orleans Cotton Exch. v. Illinois Central R. R., 2 Int. Com. Rep. 777, 3 I. C. C. Rep. 534 (1890).

[1] Prouty, Com. in New York Produce Exchange v. Baltimore & O. R. R., 7 I. C. C. Rep. 613, 659 (1898).

[2] Knapp, Com. in Board of Trade of Lynchburg v. Old Dominion S. S. Co., 6 I. C. C. Rep. 632, 646 (1896).

ance of a settled equality between localities by making for the first time a difference between them is *prima facie* unreasonable, and should be looked upon with suspicion." [3]

§ 839. Reasonableness of rate per se immaterial under statute.

Under the provisions of such a statute, the Interstate Commerce Act, for instance, the fact that a rate is *per se* reasonable does not disprove the charge that it is unlawful. If rates are relatively unjust, so that undue preference is afforded to one locality or undue prejudice results to another, the law is

[3] The general principles of statutory regulation of local discrimination may be seen in:

UNITED STATES SUPREME COURT:

Cincinnati, N. O. & T. P. Ry. v. Interstate Com. Com., 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700, B. & W. 424 (1896); Texas & P. R. R. v. Interstate Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666 (1896); Interstate Com. Com. v. Alabama M. R. R., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45, B. & W. 433 (1897); Louisville & N. R. R. v. Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209 (1898); East Tenn. V. & G. Ry. v. Interstate Com. Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516 (1901); Interstate Com. Com. v. Clyde S. S. Co., 181 U. S. 29, 45 L. Ed. 725, 21 Sup. Ct. 512 (1901); Louisville & N. Ry. v. Kentucky, 183 U. S. 511, 46 L. Ed. 403, 22 Sup. Ct. 99 (1902); Interstate Com. Com. v. Louisville & N. Ry., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687 (1904).

FEDERAL COURTS:

In addition to the above cases when before the lower federal courts see Missouri Pac. Ry. v. Texas & Pac. Ry., 31 Fed. 862 (1888); *Ex parte* Koehler, 31 Fed. 315 (1888); Interstate Com. Com. v. Atchison, T. & S. F. R. R., 50 Fed. 295 (1892); Interstate Com. Com. v. Southern Ry., 117 Fed. 741 (1902), 122 Fed. 800, 60 C. C. A. 540 (1903).

STATE COURTS:

Alabama—Lotsperch & P. v. Central Ry. & B. Co., 73 Ala. 306 (1882).

Georgia—Logan v. Central Ry. & B. Co., 74 Ga. 684 (1885).

Kentucky—Hutcherson v. Louisville & N. Ry., 22 Ky. L. Rep. 361, 57 S. W. 251 (1895).

Iowa—Blair v. Sioux City & P. R. R., 109 Iowa, 369, 80 N. W. 673 (1899).

violated and its penalties incurred, although the higher rate is not in itself excessive.[4] The right of one locality in that regard is not increased, nor is the equal right of a competing locality diminished, by municipal subscriptions which were advanced for the building of the road.[5]

§ 840. **Interdependence of rates to various localities.**

The theory upon which these statutes are administered is that there is a certain interdependence in a schedule of rates; and that rates to various related localities should not be outrageously disproportionate. By this test it is not enough that the rate charged a particular locality is not unreasonable in itself; the requirement of the statute generally is that there shall not be undue preference and priority between localities unless the circumstances and conditions are dissimilar. These elementary principles were well set forth by the Interstate Commerce Commission in applying the Federal Act in one case.[6] "It is said that the rate from St. Cloud is reasonable in and of itself. A rate can seldom be considered 'in and of itself.' It must be taken almost invariably in relation to and in connection with other rates. The freight rates of this country, both upon different commodities and between different localities, are largely interdependent, and it is the fact that they do not bear a proper relation to one another, rather than the fact that they are absolutely either too low or too high, which most often gives occasion for complaint, and which is the ground of complaint here. A rate of 12 cents per hundred pounds on flour from St. Cloud to Duluth may be reasonable when compared with a similar rate from Minneapolis. When compared with a rate of 5½ cents from the latter place, it is certainly

[4] Knapp, Com. in Board of Trade of Lynchburg v. Old Dominion S. S. Co., 6 I. C. C. Rep. 632, 646 (1896).

[5] Lincoln Board of Trade v. Burlington & M. R. R. R., 2 Int. Com. Rep. 95, 2 I. C. C. Rep. 147 (1888).

[6] Geo. Tileston Mill Co. v. Northern P. R. Co., 8 I. C. C. Rep. 354 (1898).

prima facie grossly unreasonable. Minneapolis and St. Cloud are competitors in the milling business, and when this defendant charges the St. Cloud miller 12 cents per hundred pounds for transporting his flour from St. Cloud to Duluth, while it charges the Minneapolis miller but 5½ cents for identically the same service plus an additional haul of 60 miles, it is guilty of a discrimination against the St. Cloud shipper, which is not justified by the circumstances of this case."[7]

§ 841. **What preferential rates are obnoxious.**

The discrimination in order to be considered must have some appreciable effect. There may be some disproportion in rates for which the carrier is responsible, and which possibly results in some benefits to a given community as against its commercial rival; but to be obnoxious to the law it must appear that the preference and advantage in the one case, and the corresponding prejudice and disadvantage in the other, are so appreciable and established with such a degree of certainty as to be justly declared unreasonable.[8]

§ 842. **Discrimination explained by circumstances.**

Circumstances may, however, so explain the difference between the rates compared as to deprive the lower of any bearing on the higher. "It is earnestly contended by counsel for the appellant that the rates at the longer-distance points being shown to be reasonably remunerative, and the rates at the shorter-distance points being admitted to be higher, the latter must, of logical necessity, be found to be unreasonably high, and therefore unreasonable and unjust, and such as give an undue prefer-

[7] Because of this interdependence of rates in a schedule, there should be hesitation in setting aside an established rate. Winsor Coal Co. v. Chicago & A., 52 Fed. 716 (1891). See, however, Matthews v. Board of Corp. Commrs., 106 Fed. 7 (1901).

[8] Knapp, Com. in Commercial Club of Omaha v. Chicago & N. R. R., 7 I. C. C. Rep. 386, 404 (1897).

ence to the longer-distance points, and subject the shorter distance points to an undue and unreasonable prejudice and disadvantage. It will be perceived that this argument excludes all consideration of the force of competition, and ignores its presence at the longer-distance points and its comparative absence from the shorter-distance points. What is a reasonable action, or a reasonably remunerative rate for carriage, at a given time and place, necessarily has relation to the circumstances and conditions bearing upon the actor or upon the carrier at the time and place."[9]

As will be seen in the subsequent discussion, competition is the circumstance which is most commonly relied on to justify discrimination; but any of the circumstances which were discussed in former chapters as affecting the distance-charge would be of equal pertinence.

TOPIC C—WHAT CIRCUMSTANCES JUSTIFY PREFERENTIAL RATES.

§ 843. Equalization of commercial advantages.

It has sometimes been urged that a carrier should so arrange its rates as to bring about some desirable commercial result, either by equalizing commercial advantages between two localities or by otherwise affecting natural conditions. But this theory is dangerous. The carriers' rates may seldom be regulated with such an object in view. As was said in Brewer v. Central of Georgia Railway:[10] "Shall government undertake the impossible, but injurious, task of making the commercial advantages of one place equal to those of another? It might as well attempt to equalize the intellectual powers of its people. There should be no attempt to deprive a community of its

[9] McCormick, J., in Interstate Com. Com. v. Western & A. R. R., 93 Fed. 83, 90 (1899).

[10] 84 Fed. 268 (1897).

natural advantages, or those legitimate rewards which flow from large investments, business industries, and competing systems of transportation to facilitate and increase commerce."

This view has constantly been held and enforced by the Interstate Commerce Commission, as well as by the courts. "It is not the duty of carriers, nor is it proper, that they undertake by adjustment of rates or otherwise to impair or neutralize the natural commercial advantages resulting from location or other favorable condition of one territory in order to put another territory on an equal footing with it in a common market. Each locality competing with others in a common market is entitled to reasonable and just rates at the hands of the carriers serving it and to the benefit of all its natural advantages. If this result in prejudice to one and advantage to another, it is not the undue prejudice or advantage forbidden by the statute, but flows naturally from conditions *beyond the legitimate sphere of legal or other regulation.*"[11]

§ 844. Equalizing rates sometimes may be established.

The comparison of the rate alleged to be illegal must be made with the rates from neighboring towns, similar in size, situation and volume of competing traffic, and at approximately the same distance from common markets.[12]

It is entirely legitimate for a carrier to make a difference

[11] Quoted from Freight Bureau of the Cincinnati Chamber of Commerce v. Cincinnati, N. O. & T. P. R. Co., 6 I. C. C. Rep. 195, 4 Int. Com. Rep. 592 (1893). See to the same effect, James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co., 3 Int. Com. Rep. 682, 4 I. C. C. Rep. 744 (1893); Raworth v. Northern Pac. R. Co., 3 Int. Com. Rep. 857, 5 I. C. C. Rep. 234 (1893); Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co., 4 Int. Com. Rep. 65, 5 I. C. C. Rep. 264 (1892); Chamber of Commerce of Minneapolis v. Great Northern R. Co., 4 Int. Com. Rep. 230, 5 I. C. C. Rep. 571 (1894); Commercial Club of Omaha v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 675 (1896).

[12] Knapp, Com. in Eau Claire Board of Trade v. Chicago, M. & S. L. Ry., 4 Int. Com. Rep. 65, 5 I. C. C. Rep. 264 (1892).

in rates based on a difference in natural advantages,[13] but even the most enthusiastic economists would hardly go so far as to argue that the railroads must make it their policy to equalize natural advantages, to the end that all regions of production shall have equal access to central markets. And surely no rate-making body would compel the establishing of preferential rates.

§ 845. Public policy for equalization.

That there is a certain public policy in permitting equalization, subject to strict limitations, may be admitted: "It is not the duty of carriers to disregard distance or natural disadvantages of location, and equalize access to markets for all engaged in a common business though differently situated. It may, however, be lawful and be supported by just public considerations, for carriers to give equal access to markets to localities of dissimilar distances; and it may involve no material difference in expense to the carrier. No producer or shipper has an exclusive right to supply a market, and the interests of consumers and of the general public may justify carriers in enlarging the field from which the demand for a commodity may be supplied on terms of equality for transportation. That is only a recognition of the principle that the general interests are paramount to individual or local interests. In other cases it may be unreasonable, and therefore unlawful, to give equal rates to diversely situated localities where a demand does not exist for a larger supply, and where conditions intervene that give an undue preference or advantage to the less favorably situated localities." [14]

[13] Commercial Club of Omaha v. Chicago & N. R. R., 7 I. C. C. Rep. 386 (1897).

[14] Quoted from Schoonmaker, Com. in Imperial Coal Co. v. Pittsburgh & L. E. R. R., 2 Int. Com. Rep. 436, 2 I. C. C. Rep. 618 (1889).

§ 846. Grouping by reason of competition in the articles transported.

Grouping is often resorted to in order to preserve competition in commodities carried, where a strict mileage rate would give too great an advantage to the commodities produced at the nearest point to the market. On this ground the railroads entering New York were allowed to group stations which supplied the city with milk, and to charge a uniform rate for milk carried from all stations in the group.[15] But the limitations upon this sort of thing were set forth in a later opinion [16] by the Commission, in which the problem was elaborately discussed and it was held that to be just in such cases reasonable zones ought to be established with a uniform rate within each zone.

§ 847. Burden upon the railroad to defend discriminatory rates.

The question was considered by the Interstate Commerce Commission in connection with rates for the carriage of shingles from Fredericton and Fort Fairfield, respectively, to Boston. The two places in question were situated on different branches of the same railroad. Mr. Commissioner Veazey[17] said: "A departure from equal mileage rates on different branches or divisions of a road is not conclusive that such rates are unlawful, but the burden is on the company making such departure to show its rates to be reasonable when disputed.

"The essential question here is one of relatively reasonable rates; not whether either rate is reasonable in itself. It is the effect of the carriers' action at one point upon the legitimate business prosperity of another point, which is the vital point in

[15] Howell v. New York, L. E. & W. R. R., 2 Int. Com. Rep. 162, 2 I. C. C. Rep. 272 (1888).

[16] Milk Dealers' Assn. v. Delaware, L. & W. Ry., 7 I. C. C. Rep. 92 (1897).

[17] Logan v. Chicago & N. W. R. Co., 2 Int. Com. Rep. 431, 2 I. C. C. Rep. 604 (1889).

this controversy. If the present Fredericton rate does not actually result in profit, the carriers should not seek to control or stimulate traffic from that point by making the rate so low; and if they carry for unusually small compensation from that place they do so under the plain injunction of the law that their action must not inflict undue prejudice or disadvantage upon other communities or persons. When a carrier engages in transportation for which, by reason of competitive conditions or for purposes of its own, it receives less rates from some patrons and at some localities, it accepts the legal obligation to give impartial service to other patrons and at other localities that sustain similar relations to the traffic." [18]

§ 848. Question of dissimilarity of condition one of fact.

The question as to what in any particular case justifies a difference of rate is one of fact.[19] "As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer haul over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substan-

[18] Manufacturers & Jobbers Union v. Minneapolis & St. L. R. Co., 3 Int. Com. Rep. 115, 4 I. C. C. Rep. 79 (1891).

[19] Shiras, J., in Interstate Commerce Com. v. Alabama Midland Ry., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45, B. & W. 433 (1897).

tially similar or otherwise, are questions of fact, depending on the matters proved in each case." [20]

TOPIC D—LONG AND SHORT HAUL.

§ 849. **Statutes regulating rates for long and short haul.**

The seeming unfairness of a higher rate for the intermediate short than for the longer haul has led to the passing of statutes in many jurisdictions, forbidding charging less for a long haul than for a short haul embraced in it; the chief of which is the Interstate Commerce Act. In that act the provision is subject to the condition that the hauls should be under substantially similar conditions. There is already a considerable body of judicial interpretation of this prohibition of charging more for short than for long haul, and more especially of the extent to which the modifying clauses affect this prohibition. These cases are considered with some detail in this chapter.

§ 850. **Various systems of making distance rates.**

These statutory provisions affect rate-making only to a certain extent. "There are four principal methods of making rates to localities: that prevailing in the Trunk Line Territory, in practical compliance with the fourth section; that in the Southeastern Territory, where basing points or trade centers are recognized to which through rates are made and the local rates are added for rates to tributary territory. To the Pacific coast, water competition has brought about low rates, and a combination of these with the local rate back fixes the rates for the interior mountain territory points. In the case under considera-

[20] Citing Denaby Main Colliery Co. v. Manchester, &c., Ry. Co., 3 Ry. & Can. Cas. 426 (1876); Phipps v. London & Northwestern Railway [1892], 2 Q. B. 229; Cincinnati, N. O. & Tex. Pac. Ry. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700 (1896); Texas & Pacific Railway v. Interstate Commerce Commission, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666 (1896).

tion rates are made to Colorado common points with Denver, Colorado Springs, Pueblo and Trinidad named as such points in the schedules, but there are several hundred smaller intermediate points to which the rates apply, so that the system is nearly the equivalent of a blanket rate, or a like rate for a large territory. The coast system of rate-making by adding the local back to the low through rate arouses complaints, for the reason that the shortest haul where the system prevails has the highest rate; that is, rates are lower the nearer to the coast terminal — an apparent violation of the fourth section. The basing point system arouses friction, in that rival centers and shorter-distance points demand like privileges, and the blanket rate finds objectors where an important point is ambitious to supply the surrounding territory. Each has its advantages and each is open to some objections." [1]

§ 851. Long and short haul at common law.

The charge by a carrier of a less rate between two points than it charges for carriage from the same initial point to an intermediate point seems at first sight indefensible. In the case of carriage of passengers it would be difficult to enforce the higher charge upon a conveyance which stopped at the intermediate point; for the passenger who had bought a ticket to the point of destination could not be restrained from leaving the train at an intermediate station. It would seem to be actionable false imprisonment to keep him on the train against his will. A train might, to be sure, run from one end to the other of the long haul without stopping at the intermediate station; and a reasonable schedule might be so arranged as to run no accommodation train through from one end of the long haul to the other. Only in that way could a lower rate for the long haul be effectually enforced.

In the case of carriage of goods, also, it appears to be clear

[1] Quoted from Kindel v. Boston & A. R. R., 11 I. C. C. Rep. 495 (1905).

abstractly that the owner may demand that his goods shall be delivered up to him at any point on the journey, provided it is reasonably easy for the carrier to comply with the demand. It is of course possible for a railroad to run freight trains through without stopping from one end to the other of the long haul, and thus defeat the demand of the owner to have his goods at the intermediate point; and it is also in its power so to make up the train that it will be difficult to drop goods directed to the end of the route at a way station. This being the case, it is not a difficult matter in the case of goods to defeat the demand of an owner for the delivery of his goods short of their destination; and as a practical matter, therefore, a lower charge for a longer haul may be enforced.

§ 852. **Limitations upon charging less for longer haul.**

As a matter of reasonableness the charge has still to be justified at common law; but this may be done in some cases. If competition is met at one point and not at another, a competitive rate is established at the former point. A railroad whose line runs through the non-competitive to the competitive point must at the latter point either meet the competitive rate or lose all business. It must of course give up the business rather than carry at a loss, and throw upon the remaining traffic the burden of supporting the road and also of making up the loss. But the competitive rate is ordinarily slightly remunerative; it yields a net income, though less than is necessary to pay its proportion of the fixed charges. If the business is given up, all the fixed charges must be paid by the traffic at the non-competitive points; if the competitive rate is met and business obtained, the profit from the business will go to reduce the amount of fixed charges to be paid by the non-competitive traffic. As the competitive traffic will not pay its share of the fixed charges, the non-competitive traffic, having more than its share of the fixed charges to bear, will necessarily pay a rate higher than the competitive rate in proportion to the distance; and it may well be obliged

to pay absolutely a higher rate than the competitive rate for a longer haul. Nevertheless, the rate will be lower than it would be if the railroad did not meet the competitive rate and obtain its share of the business; and therefore, being the lowest rate which the carrier can charge and obtain fair compensation, it is reasonable at common law.

§ 853. Competition justifies reduction.

Led by these considerations, the courts have held that competition at the more distant point will constitute such dissimilarity of conditions as to justify a lower rate for the longer haul.[2]

The most elaborate argument in favor of that view has been made by Mr. Justice White in East Tennessee, Virginia & Georgia Railway v. Interstate Commerce Commission.[3] "The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition

[2] An important series of recent cases in the United States Courts established this doctrine:

UNITED STATES SUPREME COURT:

Cincinnati, N. O. & T. P. Ry. v. Interstate Com. Com., 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700 (1896); Texas & P. Ry. v. Interstate Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666 (1896); Interstate Com. Com. v. Alabama Mid. Ry., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45, B. & W. 433 (1897); Louisville & N. Ry. v. Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209 (1898); East Tenn. V. & G. Ry. v. Interstate Com. Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516 (1901); Interstate Com. Com. v. Clyde S. S. Co., 181 U. S. 291, 45 L. Ed. 866, 21 Sup. Ct. 512 (1901).

FEDERAL COURTS:

In addition to the above cases, while in various stages below, see: Missouri Pac. Ry. v. Texas & P. Ry., 31 Fed. 862 (1886); Ex. p. Koehler, 31 Fed. 315 (1886); Interstate Com. Com. v. Atchison, T. & S. F. Ry., 50 Fed. 295 (1892); Interstate Com. Com. v. Southern Ry., 105 Fed. 703 (1900).

[3] *Supra.*

provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it. . . . If the carrier was prevented under the circumstances from meeting the competitive rate at Nashville, when it could be done at a margin of profit over the cost of transportation, it would produce the very discrimination which would spring from allowing the carrier to meet a competitive rate where the traffic must be carried at an actual loss. To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, without anywise benefiting the public."

TOPIC E—COMPETITION AS A FACTOR.

§ 854. Competitive rate must be reasonable.

On the other hand, considerations which must lead the courts to some limitation of this doctrine were thus expressed by Judge Severens in the court below:[1] "If railway carriers engage in a competitive struggle for business at a place where they meet, and underbid each other or other carriers to a point which is not in itself remunerative, can they turn back on the line, and taking advantage of the conditions existing at other localities, arising either from the fact that there is no opportunity for competition, or from the fact that by concert of the carriers there is none,

[1] Interstate Commerce Com. v. East Tennessee V. & G. Ry., 85 Fed. 107, 115 (1898).

charge such rates for the shorter haul as shall make good their lack of profits in competitive business, and even up the profits on their whole business to the point they set before themselves as reasonable? To the proposition thus roundly stated, no doubt counsel for the carriers would say that they could not contend for it. And yet this is the result reached by the not very indirect steps of the argument. And the proposition itself cannot be admitted without 'tearing up by the roots' the whole scheme of the commerce act. This is one of the considerations tending to minimize somewhat the privilege arising from competition."

And this Mr. Justice White reiterated, clearly expressing the nature of the limitation. "That, as indicated in the previous opinions of this court, there may be cases where the carrier cannot be allowed to avail of the competitive condition because of the public interests and the other provisions of the statute, is of course clear. What particular environment may in every case produce this result cannot be in advance indicated. But the suggestion of an obvious case is not inappropriate. Take a case where the carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency towards unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places.[2]

§ 855. Non-competitive rate must not be extortionate.

On the other hand the rate to the intermediate point where there is no competition must not be unreasonable in itself.

[2] White, J., in East Tennessee V. & G. R. R. v. Interstate Commerce Com., 181 U. S. 1, 19, 45 L. Ed. 719, 21 Sup. Ct. 516 (1901).

The Supreme Court has guarded its opinions to this extent: "In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration, in determining the questions of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration." [3]

§ 856. **Competition may affect all parts of a joint rate.**

In Interstate Commerce Commission v. Cincinnati, Portsmouth & Virginia Railroad,[4] the rates between the west and Wilmington, North Carolina were attacked as unreasonably high compared with the rates from the same points to Norfolk and Richmond. The greater part of the carriage in all cases was a common haul over trunk lines; and those lines exacted as their part of the through rate for the same haul on their roads, a much greater amount for goods destined to Wilmington than for goods destined to Richmond or Norfolk. This difference was held justified by the active competition at the latter points.

§ 857. **Potential competition.**

Whether potential river competition which is not actual can be considered was discussed by the Circuit Court of Appeals

[3] Mr. Justice Shiras, in Interstate Commerce Com. v. Alabama Midland Ry., 168 U. S. 144, 167, 42 L. Ed. 414, 18 Sup. Ct. 45 (1897).

[4] 124 Fed. 624 (1903).

in East Tennessee, Virginia & Georgia Railway v. Interstate Commerce Commission.[5] The facts were not shown to present a case of even potential competition; but Judge Taft seemed on the whole to agree that mere potential competition might properly affect the rate. The effect of the Erie Canal upon grain freight rates was cited as a significant example of merely potential competition affecting the rates.

If, however, a potential competition has not in fact affected rates, it clearly need not be considered. This was clearly held by the Supreme Court.[6] Mr. Justice White said: "In the report of the Commission a suggestion is found that LaGrange should be entitled to the same rate as Atlanta, because, if the carriers concerned in this case in connection with other carriers reaching LaGrange chose to do so, they might bring about competition by the way of a line between Macon and LaGrange which would be equivalent to the competitive conditions existing at Atlanta. We are unable, however, to follow the suggestion. To adopt it would amount to this: That the substantial dissimilarity of circumstances and conditions provided by the Act to Regulate Commerce would depend, not as has been repeatedly held, upon a real and substantial competition at a particular point affecting rates, but upon the mere possibility of the arising of such competition. This would destroy the whole effect of the Act, and cause every case where competition was involved to depend, not upon the fact of its existence as affecting rates, but upon the possibility of its arising. What the 4th section of the Act to Regulate Commerce has reference to is an actual dissimilarity of circumstances and conditions, not a conjectural one."

[5] 99 Fed. 52, 39 C. C. A. 413 (1899).

[6] Interstate Commerce Com. v. Louisville & N. R. R., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687 (1903).

§ 858. **Competition artificially removed at the nearer point.**

The question whether a higher rate can be justified for the shorter haul when the natural competition at that point has been removed artificially by an agreement of all the carriers there was considered by Judge Taft in East Tennessee, Virginia & Georgia Railway v. Interstate Commerce Commission.[7] The rates from Nashville through Chattanooga to the southern seaboard were lower than those from Chattanooga. The discrimination was justified on the ground that there was competition in Nashville, but not in Chattanooga. In the physical conditions of the cities there was no reason for the distinction; each was situated on a navigable river, and each was a railroad center. More roads entered Chattanooga than Nashville. But the Chattanooga rates were fixed and agreed upon by an association of the Southern railways and steamship companies. Judge Taft regarded such a stifling of competition as no excuse for the higher rate. The Supreme Court[8] reversed the judgment of the Circuit Court of Appeals, not because the latter erred in its law, but because the finding of facts was not justified by the record.

§ 859. **Nominal competition as justifying lower rate for longer haul.**

In East Tennessee, Virginia and Georgia Railway v. Interstate Commerce Commission,[9] Judge Taft in the Circuit Court of Appeals dealt with an apparent competition which was not real because of a secret arrangement between the carriers. The lower rates for the longer haul from Nashville to the seaboard were justified by the competition at Nashville between two railroads, the Louisville & Nashville and the Nashville, Chattanooga and St. Louis. There was an apparent competition be-

[7] 99 Fed. 52, 39 C. C. A. 413 (1899).

[8] East Tennessee V. & G. Ry. v. Int. Com. Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 512 (1901).

[9] 99 Fed. 52, 39 C. C. A. 413 (1899).

tween these roads, and they named independent rates; but the latter road was controlled by the former through ownership of a majority of the stock. The Circuit Court of Appeals held that this was not a real competition, and could not be considered as a dissimilar circumstance which would justify a difference in rates. Judge Taft said: "We know that it is stipulated in the record that the officers of the Nashville, Chattanooga & St. Louis Railway Company would testify that it competes with the Louisville & Nashville Railroad Company, and that they are under different managements; but such evidence must be weighed in the light of the history of railroads in this country, and the motives that ordinarily govern in railroad management. One railroad company acquires the controlling interest in another company to control its general policy; and, while it may permit independence in the personnel and the details of management, it needs more than a stipulated statement of this general nature to induce a belief that the company which elects the directors of the other will permit that other to take a course materially detrimental to the interests of the owning company."

The Supreme Court[10] reversed the decision on the ground that the facts on which it was based were at variance with those found by the Commission; and the court refrained from expressing its opinion upon the proposition of law. It is difficult to see how any doubt can exist on the point. If the Circuit Court of Appeals was right in finding that the competition which appeared to exist at Nashville was in reality stifled by a control of all carriers by one of them, there was surely no such competition as would create a dissimilar condition by forcing upon one road a low competitive rate. In a later case in the Supreme Court,[11] Mr. Justice White said:

[10] East Tennessee V. & G. Ry. v. Int. Com. Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 512 (1901).

[11] Interstate Commerce Com. v. Louisville & N. R. R., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687 (1903).

"Of course, if, by agreements or combinations among carriers, it were found that at a particular point rates were unduly influenced by a suppression of competition, that fact would be proper to consider in determining the question of undue discrimination and the reasonableness *per se* of the rates at such possible competitive points."

§ 860. Stifling of competition by consolidation.

Where competition at the intermediate point is stifled, not by an agreement among the competing roads, but by a consolidation of all the roads into one, it has been urged that for the purpose of determining the reasonableness of discrimination the point should continue to be regarded as a competitive point. This was urged in the Danville case.[12] The rates between Southern and Western points and Danville were very much higher than those between the same points and Lynchburg, the business rival of Danville. There was an active competition between railroads at Lynchburg. Such competition had existed at Danville, but all the other roads were absorbed by the Southern Railway. The courts held the discrimination justified. The case went off on the ground that before the consolidation of the last competing road with the Southern the rates were as high as at the time proceedings were begun.

§ 861. Carrier need not consider competition.

The carrier is not bound to consider competition in fixing its rates, and to give a lower rate to a competitive point. "Now, to anyone who has given the Act to Regulate Commerce much attention it must be obvious that a complainst against a carrier that it gives to non-competitive points the same rates which it gives to competitive is not a complaint that the Act is violated. On the contrary, the spirit and purpose of the Act require that

[12] Interstate Commerce Commission v. Southern Ry., 117 Fed. 741 (1902), 122 Fed. 800, 60 C. C. A. 540 (1903).

when the circumstances and conditions will fairly admit of it the charges to all points for a like service should be made relatively equal. If, therefore, this defendant were to so arrange its tariffs as to give the least important station on its line rates as favorable as it allowed to the most important, there would in its doing so be nothing out of harmony with the Law. The result might for a time be prejudicial to competitive points, but the carrier cannot be blamed for a consequence which the Law favors; and there can be no doubt that the Law favors Reidsville and Goldsboro' having rates as low as are given to Danville or to Richmond when the circumstances and conditions are such as to render it practicable. There is nothing, therefore, in the giving of such rates which the law will discountenance, much less punish." [13]

[13] Cooley, Commissioner, in Crews v. Richmond & D. R. R., 2 Int. Com. Rep. 703, 1 I. C. C. Rep. 401 (1888).

PART I.

Examination of American Legislation.

CHAPTER XXVI.

HISTORY OF STATUTORY REGULATION.

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TOPIC A—LEGISLATION IN ENGLAND SINCE 1830.

§ 871. Carriers' limitation of liability before 1830.

The practice of the carriers of escaping full liability for goods carried became established at a very early date. The hint for this was given by Lord Coke in his report of Southcote's case.[1] In a note to that case he pointed out the desirability of bailees' making a special acceptance of goods to hold as their own in order to escape the absolute liability which, as he believed, all bailees underwent. His view as to the absolute liability of all bailees was soon modified by the courts, but carriers continued under this liability, and indeed the stringent nature of their obligation was increased by the decision of the Court of the King's Bench in the case of Forward v. Pittard.[2]

In order to escape this excessive obligation, carriers came more and more to limit their liability by special acceptance. This was usually effected by the giving of notice to shippers that the carrier would not be responsible under certain circumstances, or to the full extent of the value of the goods carried. These notices were usually posted in the shipping office, and were often contained in advertisements in newspapers. The courts allowed the practice and permitted the carriers thus to limit their liability.

Eventually the carriers attempted so great a limitation of their liability that shippers were really left without protection, and it became necessary to correct the evil by legislation. This was the occasion of the first English statute.

§ 872. The Carriers' Act of 1830.

The Carriers' Act of 1830 applied to all carriers by land. Its most important provision forbade the limitation of liability by public notice, permitting, however, the carrier to make special

[1] 4 Coke, 83b (1601).
[2] 1 T. R. 27 (1785).

contracts for the conveyance of goods.[3] The statute further exempted the carrier from liability beyond the value of £10 unless special notice of value was given.[4]

Under this Act the giving of special notices ceased for several years, but finally the carriers again attempted to limit their liability by the giving of special notice, and the courts finally found a way of permitting the limitation of liability in this way notwithstanding the provisions of the statute. In the case of Walker v. York and No. Midland Railway,[5] the plaintiff sued the carrier for the loss of fish he had shipped, which had been injured by the negligent delay of the carrier. The defendant had distributed to the plaintiff and others printed notices saying it would not be liable for any damage caused by delay and that no servant had any authority to alter this condition. The plaintiff claimed that he was not bound by such a notice, and that it would not protect the carrier, and, so claiming, he shipped the fish. The court advised the jury if they found that the plaintiff had received the notice to find for the defendant, unless the plaintiff had unambiguously refused to deliver the goods on the terms of the notice and the defendant had acquiesced in the refusal. Under this instruction the jury found for the defendant, and the Court of the Queen's Bench held the verdict correct.

§ 873. The Railway and Canal Traffic Act of 1854.

Partly as a result of this practice of the carriers thus legalized by the courts, Parliament passed the Railway and Canal Traffic Act of 1854.[6] This Act applied only to carriers by railway and canal. It forbade the limitation of liability by notice and provided that no contract limiting liability should be valid unless it

[3] 11 Geo. 4 & 1 Wm. 4, c. 68, §§ 4, 6.
[4] *Ibid*, § 1.
[5] 2 E. & B. 750 (1853).
[6] 17 & 18 Vict. c. 31.

was in writing and signed by the shipper. In addition to this provision it contained several other important regulations of carriage by railway.

In the second section it provided that every railway and canal company should afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals and for the return of carriages, trucks, boats, and other vehicles; that no such company should give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, or subject any person, company, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every such carrier having a railway or canal which formed a part of a continuous line of communication or which had a station near the station of another carrier should afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one or the other such railway without any unreasonable delay or preference or advantage, so that no obstruction might be offered to the public desirous of using such railways or canals as a continuous line of communication, and so that all reasonable accommodation might at all times be afforded to the public.

In the third section it was provided that any company or person might complain of a violation of the act in any of the courts, and that the attorney-general might complain on behalf of the public; that injunctions might be issued and a penalty exacted for disobedience of such injunction.

§ 874. The Railway and Canal Commission.

In 1888[7] a commission was established in Great Britain, called the Railway and Canal Commission, with both administrative and judicial duties. The Commission is composed of two appointed members (one of them experienced in railroad

[7] 51 & 52 Vict. c. 25.

business) and a judge of the Superior Court, appointed in each country of the United Kingdom for the business of that country. All three commissioners sit in each case brought before the Commission; but the two appointed members may do administrative business. To this Commission the returns are to be made; and they are to hear complaints for violation of the provisions of the Railway and Canal Traffic Act or other regulative acts, and any dispute with regard to tolls, rates and charges. They may order such reasonable facilities for traffic as the interests of the public may require. They may award damages for violations of law or for overcharge; but no damages can be awarded for overcharge where the rate charged had been properly published. The Commission may order two or more companies to make joint arrangements for traffic, and apportion the expense. Complaint may be made by municipal bodies or by trade associations.

On questions of fact no appeal is allowed from an order or decision of the Commission. On any question of law the judicial member of the Commission shall decide, in case of difference of opinion; and from the decision of the Commission an appeal lies regularly to the Court of Appeal and thence to the House of Lords. On appeal the court may draw such inferences as are not inconsistent with the facts expressly found, when it is necessary to determine the question of law.

A classification and rate sheet must be submitted by every railway to the Board of Trade, which after hearing passes upon it; the schedule after approval is then introduced into Parliament and passed as a statute, fixing thereby the *maximum* rates of the railway. If the schedule of the railway is not approved, the Board of Trade may make and introduce into Parliament its own schedule.

The Railway and Canal Traffic Act is amended by providing that if a joint rate is necessary as a reasonable facility for traffic, the railways may be required to make a joint rate. Differences

in charges for similar services to traders of different districts presumably constitute an undue preference, and the burden of proving them reasonable is on the railway. The Commission may so far as it thinks reasonable consider whether such difference is necessary "for the purpose of securing in the interests of the public the traffic in respect of which it is made;" provided no difference shall be made in the treatment of home and foreign merchandise.

The Commissioners have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway. Group rates are permitted.

Provisions are made for posting the tariff sheet at stations; for complaints to the Board of Trade; for filing returns; and for the Board of Trade making rules and regulations.

Six years later, by an amendment,[8] it was provided that if a railway increased its rates, and a shipper filed a complaint with the Commission, the complainant (unless otherwise ordered by the Commission) need pay at the outset no more than the old rate; and the burden is on the railway to justify the increase.

In 1904 it was provided further[9] that the reasonable facilities required by the Railway and Canal Traffic Act shall include reasonable facilities for the junction of private sidings or private branch railways with the main line, and reasonable facilities for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways.

[8] 57 & 58 Vict. c. 54.
[9] 4 Edw. 7 c. 19.

TOPIC B—LEGISLATION IN AMERICAN STATES.

§ 875. Early railway charters in the United States.

The beginning of statutory regulation of the American railways is coeval with the railways themselves. The first railway charters contained regulations as to the doing of the business, which have been of considerable importance in the history of statutory regulation. One of the earliest such charters was that of the Baltimore & Ohio Railway in 1827.[1] This charter, among other provisions, limited the amount of tolls to be charged for freight and also expressly reserved to any future company the right to connect with the road. The charter of the Worcester Railroad in 1829 limited the toll to six cents a ton per mile.[2] Other charters limited the earnings of the railroad to a certain percentage each year to amounts varying from ten to twenty-five per cent per annum.

§ 876. Granger legislation.

Between 1870 and 1880 the western states began to pass stringent statutes for the regulation of railway charges. The railways running through this section were principally organized and owned in the eastern states, and the farmers of the west had become dissatisfied with the treatment they received, believing that the roads were managed exclusively in the interest of their eastern owners. The cruder legislation at the beginning of this period provided in the statute itself maximum rates for the carriage of freight. For instance, in the constitution of 1870[3] the Illinois legislature was given express power to establish reasonable maximum rates by railroads for the transportation of passengers and freight on the different railroads of the State.

[1] Laws of Maryland, 1826, c. 123.
[2] Massachusetts Acts of 1829, c. 26.
[3] Art. XI, sect. 12.

Extracts from some State statutes belonging to this period are in chapter xxxvi.

§ 877. Railroad commissions.

The regulation of charges by direct legislation was found not to be a convenient or effective method, and the States soon agreed in establishing State commissions, which were given in several States the power to fix maximum rates. The movement for the establishment of railroad commissions has covered the entire country. Almost every State has such a commission, although the powers entrusted to it differ widely in the different States. Some commissions have been granted full power to fix rates; others have power to revise rates, while many are simply established to investigate railroad conditions and report to the legislature. In chapter xl extracts from these State statutes are given.

The effectiveness of these commissions has depended to a great extent upon the skill and ability with which they are administered, and the confidence felt in their decisions. Thus one of the most efficient is the Massachusetts Railroad Commission; yet its power over the railroads is merely advisory. Without any power whatever to fix rates, it nevertheless indicates to the railroads what rate in its opinion is reasonable, and in no instance has its recommendation been neglected; because if such a recommendation were reported to the legislature as disregarded by the railroad, a statute would undoubtedly be passed to enforce it. The similarity of this practice with the English law will be noted.

§ 878. Regulations against discrimination.

Meanwhile other difficulties were felt by the people beside that of excessive charges. The discrimination of railroads in favor of certain shippers came to be an industrial evil, and provisions were adopted in State after State forbidding such dis-

crimination. Among the earliest was that contained in the constitution of Pennsylvania of 1873, in which it was provided that persons and property should be transported without undue or unreasonable discrimination in charges or in facilities. In chapter xxxvii extracts from these various State statutes are given.

TOPIC C—FEDERAL LEGISLATION SINCE 1887.

§ 879. The Interstate Commerce Act.

The power given to Congress by the constitution over commerce between the States was not taken advantage of until the year 1887, when the Interstate Commerce Act[1] was passed. This act was founded to a considerable extent on the English Railway and Canal Traffic Act, although many of its provisions were influenced by prior State legislation. In that Act the Interstate Commerce Commission was created; railroads were forbidden to discriminate between persons, places or varieties of traffic. The Commission was given the power to investigate alleged violations of the Act and to make orders thereon and power was given to the courts to act in support of such orders. One or two particular abuses were directly forbidden. Thus it was forbidden to charge more for a shorter than for a longer haul in the same direction and over the same route under substantially similar conditions, and the practice of giving rebates or free carriage was forbidden.

Amendments to the Act were made in 1889[2] and 1891[3] perfecting the Act, extending the power of the federal courts, and supporting the Commission in its investigations by giving it greater power to summon witnesses and elicit testimony.

1 Act of Feb. 4, 1887; 24 Stat. 379, 3 Comp. Stat. p. 809.
2 Act of March 2, 1889; 25 Stat. 855.
3 Act of February 10, 1891; 26 Stat. 643.

§ 880. The Elkins Act of 1903.

In 1903 the so-called Elkins Act was passed to perfect the Act.[4] In the first section corporation commerce carriers are made criminally responsible for violations of the Act. In the second section provision is made for bringing into any proceeding before the Commission all carriers or other persons interested in the inquiry. In the third section jurisdiction is given to the courts sitting in equity, at the request of the Commission, to inquire into and enjoin any infraction of the provisions of the Act. These suits shall be prosecuted by the District Attorneys under order of the Attorney-General, and shall not preclude suit by private persons. Provision is made for speedy trial.

TOPIC D—INTERPRETATION OF THE INTERSTATE COMMERCE ACT.

§ 881. The long and short haul clause.

It was undoubtedly the intention of the framers of section 4, the long and short haul clause, to forbid absolutely the practice of charging more for a shorter haul unless upon application to the Commission express permission so to charge was given. The section, however, was a matter of contention between the two houses of Congress, and as it was finally passed the qualifying phrase "under substantially similar circumstances and conditions" was inserted without probably any very clear belief that the meaning of the section was thereby fundamentally altered. At first the railroads acted upon the supposition that express permission of the Commission must be obtained according to the proviso in the section, if a greater charge was to be made for the shorter haul, and this seemed to be the view at first taken by the courts. The philosophy of the Act as expressed by Judge Shiras

[4] Act of Feb. 19, 1903; 32 Stat. 847, U. S. Comp. Stat. Supp. of 1903, p. 363.

in Van Patten v. Chicago, M. & St. P. Ry.,[1] was that competition would reduce the rates to a fair amount at all competitive points, and that the 4th section would then keep the rates at non-competitive points down to the level of the competitive rates. The courts, however, finally decided in view of the limitation of the section to cases where the conditions were substantially similar that competition with other railroads would justify a lower rate for the longer haul, and as practically all cases of the sort before the passage of the Act had been due to the competition of other railways, this decision in effect qualified the whole section. Since that time few applications have been made to the Commission for express permission to charge the higher rate, since under the decision of the courts any reason which would justify such permission by the Commission would justify the charge at the lower rate by the railroads without obtaining permission. These matters have been discussed in chapter xxv and will be treated in detail in chapter xxx.

§ 882. The fixing of rates.

From the outset of its history the Commission claimed that under the Act it had the power not merely to forbid an unreasonable rate, but also to indicate to any railroad what it would regard as a reasonable rate for any particular service, and that then the railroad disregarding such recommendation would be subject to the action of the courts. The lower federal courts, however, from the beginning denied this power to the Commission. The question did not reach the Supreme Court of the United States for ten years, but finally in the case of Cincinnati, New Orleans and Texas Pacific Railway v. Interstate Commerce Commission,[2] the issue was fairly presented, and the Supreme Court of the United States decided that the Commission had no

[1] 81 Fed. 545 (1897).

[2] 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700, 5 Int. Com. Rep. 391 (1896).

power to fix rates. Since that time the Commission has under certain circumstances advised a railroad that in its opinion a reasonable rate would be no greater than a sum named, but no attempt has been made to go further than this in fixing rates.

It will have been noticed that the English practice is to fix rates by Act of Parliament upon recommendation of an administrative body.

§ 883. Through routes.

The practice of carriers to make through traffic arrangements with some one connecting line, and to throw all business into the hands of that line, notwithstanding the wishes of the shipper and without regard to his interests, caused dissatisfaction. It is true that in case such an arrangement was made the through rate would be posted; but if the tariff sheet did not state the route the shipper was deprived of a chance to discover and ship by a cheaper route, or one more agreeable to him for any reason. Furthermore, the connecting carriers sometimes refused to recognize the joint rates and collected their entire local charges.

The Commission in 1894 ordered that published joint tariffs should indicate the route, and that the connecting carriers should file a consent to the rate.[3] But the carriers refused to abide by this order; and upon a suit for enforcing it the Supreme Court finally held that the carrier might publish a through tariff of rates, reserving the right to route as it pleased.[4]

TOPIC E—THE RATE REGULATION ACT OF 1906.

§ 884. Occasion for the Act.

The attitude of the courts toward the Interstate Commerce Act caused considerable dissatisfaction, especially in those parts of the country where the great bulk of freight originates,

[3] In re Form and Contents of Rate Schedules, 6 I. C. C. Rep. 267 (1894).

[4] Southern Pacific Co. v. Interstate Commerce Commission, 200 U. S. 536, 26 Sup. Ct. 330 (1906).

and the desire for further regulation culminated in the passage of the Rate Regulation Act of 1906. This action of Congress had been foreshadowed by a very considerable body of similar legislation in the States between 1903 and 1905. It is characteristic of this legislation that it confers on the railway commissions the power of fixing a maximum rate and the giving of such power to the Interstate Commerce Commission was in fact the chief object of those who secured the passage of the Railroad Rate Act. The decisions of the Supreme Court, which have given most dissatisfaction are the decision denying the Commission the power to fix rates and that permitting the carrier to charge a less sum for a longer haul.

In addition to this, certain omissions in the original act were found to work badly, in view of the railroad practices. Most of these defects had been remedied by legislation in England.

The occasion for the new Act was thus stated by the Congressional Committee that reported the bill:

"It has been believed by a large portion of the shippers that railway rates were in many instances too high, and that favoritism through rebates and other forms of discrimination were indulged in by various methods by the carriers. The ingenuity of some of the carriers and shippers has resulted in avoiding the provisions of that Act through the use of joint tariffs, involving, in some instances, a railroad and a mere switch owned by a shipper; through arrangements whereby excessive mileage was given to the shipper of products who owned his own cars; through the use of refrigerator cars; through the permission given to independent corporations to render some service incident to the shipment, as the furnishing of ice in the bunkers of the car; by what is known as the "midnight tariff," a method involving an arrangement with a shipper to assemble his freights, have them ready for shipment at a particular date, whereupon the carrier would give the necessary three days' notice of a reduction in the rate. Competing carriers and ship-

pers would know nothing about this arrangement. The freight would be shipped at the new lower rate, and then there would be a restoration of the old rate. The law of to-day would be fairly satisfactory to all shippers if the spirit of fairness required by it had controlled the conduct of the carriers, and the necessity for the proposed legislation is the result of and is made necessary by the misconduct of parties who are now most clamorous against additional restraint. If the carriers had in good faith accepted existing statutes and obeyed them there would have been no necessity for increasing the powers of the Commission or the enactment of new coercive measures."

§ 885. **Extension of scope of the Interstate Commerce Act.**

The Act of 1906,[1] like the Elkins Act, is in the form of an amendment to the original Interstate Commerce Act; and it perfects that Act by an extension of its scope. It includes in the provisions of the Act express and sleeping-car companies and pipe lines for the transportation of oil or any other commodity except water and natural or artificial gas. It enumerates at great length the persons to whom free passes may be issued (the original act having named typical classes only), and makes it a crime to issue or to use a pass contrary to the provisions of the Act. It makes the penalties for a violation of the Act more severe, and provides more carefully for the institution of prosecutions for violation of the Act.

§ 886. **Private Switches.**

Several new provisions are directed against certain abuses which had fostered monopolies. Among the chief of these abuses was that of the private switch. The original Act had left it possible for a railroad to serve a favored shipper by making connection with his private switch and refusing a similar connection to another shipper. This is forbidden in the Act of

[1] Act of June 29, 1906; Pub. Acts, No. 337.

1906. By a provision in section 1 of the Act, it is provided that any common carrier subject to the provisions of this Act upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. In case the carrier refuses, upon application, to make or operate such connection, an appeal is given to the Commission, which may make an order for the allowance of reasonable facilities. This provision is very like the provision of the English Act of 1904.[2]

§ 887. Private car lines.

One of the most galling monopolies established by action of the railroads and permissible under the original act, was that of the private car. One or two great corporations, by contract with the railroads, established a monopoly of the supply of refrigerator cars for the carriage of perishable fruit; and a similar, though perhaps less far-reaching monopoly, was created in tank cars.[3] The evil of the private car line was felt in two directions: first, the charge to ordinary shippers using the cars was increased by monopolistic rates; second, the charge to the owners of the cars was greatly lessened by rebates for the use of the cars. In the first section of the new Act it is provided that the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or

[2] *Ante*, § 874.
[3] *Ante*, §§ 95, 806-808.

carriage, irrespective of ownership or of contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. In Section 4 of the new Act, it is further provided that if the owner of property transported, directly or indirectly, renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

§ 888. **Dealing by railroads in commodities.**

Another abuse tending to monopolistic conditions has been the acquiring by railroad companies of various industrial properties, especially mines. The result of this has been that the railroad, through its control over transportation, has been able to undersell its competitors and at the same time enrich itself. Its power has, to be sure, been limited by a recent decision of the Supreme Court;[4] but the new Act has dealt with the subject in a thoroughgoing way. In section 1 the Act provides that from and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the

[4] *Ante*, §§ 301, *et seq.*

manufactured products thereof, manufactured, mined, or produced by it or under its authority or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its own use in the conduct of its business as a common carrier.

§ 889. Rate fixing and court review.

The most important feature of the new Act is that giving the Commission the power to fix maximum rates. The fixing of maximum rates has not been uncommon in the States; and in other countries it has been usual if not universal. In England, maximum rates are fixed, not by the Railway and Canal Commission, but by the Board of Trade, one of the executive departments of the government, after due hearing; and the rates thus fixed are enacted in the form of statute by Parliament, after an opportunity for hearing before a committee. The provisions of the new Act are, that upon complaint the Commission, after hearing, shall determine a reasonable maximum rate, which shall take effect at such time after thirty days as may be fixed by the Commission, and shall continue in force not more than two years, unless suspended or set aside by the Commission or the courts. The carrier aggrieved may appeal to the courts for an injunction against the rate so fixed. No injunction or interlocutory order shall be issued without a hearing after five days' notice to the Commission. An appeal from the Circuit Court lies directly to the Supreme Court, and preference is given to such cases. No change in rates, even within this maximum, can be made by the carriers until after thirty days' notice, unless this period is shortened by the Commission.

A special provision for a rehearing by the Commission, upon request, is made in section 6 of the new Act.

§ 890. **Through routes and rates.**

The English acts gave to the Railway and Canal Commission power to establish through routes and to Parliament, on recommendation of the Board of Trade, power to establish through rates whenever this course was required, in order to create reasonable facilities; but this power was not included in the original Interstate Commerce Act. The Commission has often recommended that the power be granted, and this has now been done. In section 1 of the new Act, it is made the duty of every carrier subject to the provisions of the Act to establish through routes and just and reasonable rates applicable thereto. In section 4 of the Act it is provided that the Commission may, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of the Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists; and this provision shall apply when one of the connecting carriers is a water line. The secret routing evil is met by section 2, in which it is provided that the names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

TITLE I.

THE INTERSTATE COMMERCE ACTS.

CHAPTER XXVII.

CARRIAGE SUBJECT TO THE ACT.

§ 891. Provisions of the statute.
892. Amendments of 1906.

TOPIC A—EXTENT OF APPLICATION OF THE ACT.

§ 893. Effect of the act.
894. Foreign carriers and discriminations.

TOPIC B—WHAT IS INTERSTATE COMMERCE.

§ 895. What are States.
896. Nature of interstate traffic.
897. Termini within a single State, route passes through a second State.
898. Breaking continuity of interstate shipment.
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TOPIC D—CARRIERS SUBJECT TO THE ACT.

§ 901. Kind of carrier subject to the act.
902. Carriage wholly within the State.
903. Local carrier taking part in through carriage.

§ 891. Provisions of the statute.

To what carriers applicable.—The provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity,

except water and except natural or artificial gas by means of pipe lines, or partly by pipe lines and partly by railroad or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, that the provisions of this Act shall not apply to the transportation of passengers or property, or the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid. The term "common carrier," as used in this Act, shall include express companies and sleeping-car companies.

Railroad: meaning.—The term "railroad," as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind

used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property.

Transportation: meaning.—The term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. [Interstate Commerce Act, section 1, as amended by Act of June 29, 1906, section 1.]

Railroad forbidden to deal in commodities.—From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier. [Interstate Commerce Act as amended by Act of June 29, 1906, section 1.]

§ 892. **Amendments of 1906.**

The new provisions of the Act of June 29, 1906, are as follows:

1. At the beginning of the section, the clause making pipe lines subject to the provisions of the Act is new. See *ante*, § 43.

2. At the beginning of the second paragraph, express companies and sleeping-car companies are included in the term "common carriers."

Express companies are common carriers at common law (*ante*, § 181), but were not included in the original act; only when the express business was conducted by a railroad was it subject to the Act (*post*, § 901). Sleeping-car companies are not carriers at common law, but are public-service companies (*ante*, § 96).

3. Within the term "railroad" are included switches, tracks, and terminal facilities, and freight depots and yards. Within the term "transportation" are specifically included cars and other vehicles, irrespective of ownership or contract for their use (the former provision being merely that the term should include all instrumentalities of shipment and carriage); and it is made the duty of carriers to furnish such transportation.

4. The entire provision with regard to the carriage of commodities owned or produced by the railroads is new. See *ante*, Chapter X, Topic D.

TOPIC A—EXTENT OF APPLICATION OF THE ACT.

[See chapter XV as to the division between interstate and intrastate business.]

§ 893. Effect of the Act.

The entire commerce of the United States, foreign and interstate, is subject to the provisions of the act of Congress to regulate commerce. Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666, 5 Int. Com. Rep. 405 (1896). It is intended to and does apply, not only in cases of direct injury to particular individuals or industries, but also in cases involving indirect injury to the community as a whole. Re Export and Domestic Rates on Grain, 8 I. C. C. Rep. 214 (1899). It applies to all carriers and to all cases subject to its control. It abrogates all executory contracts between carriers and shippers inconsistent with its provisions, and is not contrary to the Constitution in doing so. Kentucky & I. Bridge Co. v. Louisville & N. R. R., 1 Int. Com. Rep. 704, 715, 2 I. C. C. 162 (1888); Fitzgerald v. Fitzgerald & M. C. Co., 41 Neb. 374, 59 N. W. 838 (1894). See Haddock v. Delaware, L. & W. R. R., 3 Int. Com. Rep. 302, 4 I. C. C. 296 (1890). Similarly a provision in a charter granted by the State is controlled by the Act; and therefore the Northern Pacific Railroad Company is not exempt under its charter from the authority to regulate rates conferred on the Commission by the Act to Regulate Commerce. Raworth v. Northern P. R. R., 3 Int. Com. Rep. 857, 5 I. C. C. 234 (1891); Merchants' Union v. Northern Pacific R. R., 4 Int. Com. Rep. 183, 5 I. C. C. 478 (1892).

§ 894. Foreign carriers and discriminations.

The provisions of the act apply to foreign as well as domestic common carriers engaged in the transportation of passengers or property, for a

continuous carriage or shipment, from a place in the United States to a place in an adjacent foreign country. The common carriers engaged in such transportation are subject to the provisions of the act in respect to the printing of schedules of rates, fares, and charges for the traffic they carry, the posting and filing with the Interstate Commerce Commission of copies of such schedules, the notice of advances or reductions, and the maintenance of the rates, fares, and charges established and published and in force at the time; and to the provisions of the act in respect to joint tariffs of rates, fares, and charges for continuous lines or routes. It was therefore held by the Commission that the Grand Trunk Railway of Canada violated the act by allowing a rebate on goods shipped from Buffalo to Canadian points. Re Grand Trunk Ry., 2 Int. Com. Rep. 496, 3 I. C. C. 89 (1889). But in order to violate the act the giving of the rebate or other violation must take place within the United States, since an act of Congress cannot affect the legality of anything done outside its jurisdiction. Therefore the giving by an international carrier of special rates outside the United States cannot be punished under the act. United States v. Knight, 3 Int. Com. Rep. 801 (1891). Nor can discrimination between places in Canada. Cist v. Michigan Central R. R., 10 Int. Com. Rep. 217 (1904). And the regulation of the transportation of foreign merchandise from a port of entry to a place within the United States upon a through bill of lading does not extend to the control of rates made in the foreign port for its carriage to the port of entry of the United States or to a foreign country adjacent. New York Bd. of Trade & Transp. Co. v. Pennsylvania R. R., 3 Int. Com. Rep. 417, 4 I. C. C. 447 (1890).

TOPIC B—WHAT IS INTERSTATE COMMERCE.

[See chapter XLII as to the constitutional questions involved.]

§ 895. What are States?

Commerce between an Indian reservation and other parts of the State in which it is situated is not interstate commerce. Selkirk v. Stevens, 72 Minn. 335, 75 N. W. 386, 40 L. R. A. 759 (1898). But commerce between the District of Columbia and the State of Maryland is interstate, and may constitutionally be regulated by the act. Willson v. Rock Creek R. R., 7 I. C. C. Rep. 83 (1897).

§ 896. Nature of interstate traffic.

The purely internal commerce of a State is that which is confined within its limits, which originates and ends within the State. The question, what is the entire transit upon which goods or passengers are being car-

ried, has already been discussed (*ante*, Chap. XX); and the question whether a certain transaction constitutes interstate commerce must be determined by ascertaining, on the principles heretofore discussed, what the real transit is, and whether that traffic is or is not between separate States. Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States, in no respect affects the character of the transaction. The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999 (1871). A train composed of empty coal cars, although destined for a point in another State to procure a load, is not engaged in transporting articles of interstate commerce so as to be beyond the control of State laws. Norfolk & W. R. R. v. Com., 93 Va. 749, 24 S. E. 837, 34 L. R. A. 105 (1896).

§ 897. Termini within a single State, route passes through a second State.

The Interstate Commerce Commission has always held that commerce between points in the same State, but which in being carried from one place to the other passes through another State, is interstate commerce, and subject to regulation by the provisions of the act to regulate commerce. New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. Ry., 2 Int. Com. Rep. 519, 2 I. C. C. 375 (1889); Milk Producers' Protective Assoc. v. Delaware, L. & W. R. R., 7 I. C. C. Rep. 92 (1897). The same doctrine was held in several of the State courts. State v. Chicago, S. P., M. & O. R. R., 40 Minn. 267, 2 Int. Com. Rep. 519, 3 L. R. A. 238 (1889); Delaware & H. C. Co. v. Com. (Pa.), 2 Int. Com. Rep. 222 (1888); Sternberger v. Cape Fear & Y. V. R. R., 29 S. C. 510, 2 Int. Com. Rep. 426 (1888). At one time it seemed that such commerce would not be held interstate commerce. Lehigh Valley R. R. v. Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, 12 Sup. Ct. 806, 4 Int. Com. Rep. 87 (1892); United States v. Lehigh Valley R. R., 115 Fed. 373 (1902); Seawell v. Kansas City, F. S. & M. R. R., 119 Mo. 222, 24 S. W. 1002, 5 Int. Com. Rep. 262 (1893); Dillon v. Erie R. R., 19 N. Y. Misc. 116, 43 N. Y. Supp. 320 (1897). But it is now finally decided that this commerce falls within the federal jurisdiction. Hanley v. Kansas City So. Ry., 187 U. S. 617, 47 L. Ed. 333, 23 Sup. Ct. 214, affirming 106 Fed. 353.

§ 898. Breaking continuity of interstate shipment.

If the transporting of goods or passengers to an ultimate destination in another State has begun, interstate commerce has begun, and no device to break up the transit into intra-state portions will affect its real nature. So where transportation of goods destined for a point without the State has been actually begun, temporary stoppage within the State, without the

intention of abandoning the original movement (which movement is ultimately completed), will not deprive the transportation of the character of interstate commerce. Delaware & H. C. Co. v. Com. (Pa.), 2 Int. Com. Rep. 222 (1888). And so if the goods are first billed to a point in the State of shipment, and at that point are rebilled to their ultimate destination in another State, without breaking of bulk, the whole constitutes a single carriage. Cutting v. Florida Ry. & Nav. Co., 46 Fed. 641, 4 Int. Com. Rep. 424 (1891); Texas & P. Ry. v. Avery (Tex. Civ. App.), 33 S. W. 704 (1895); Houston D. & N. Co. v. Insurance Co., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17 (1895); Mexican Nat. R. R. v. Savage (Tex. Civ. App.), 41 S. W. 663 (1897); State v. Gulf, C. & S. F. Ry. (Tex. Civ. App.), 44 S. W. 542 (1898).

The continuity of the carriage of freight over a line formed by two or more roads is not broken in fact and cannot be broken in law by the charge of a local rate by one or more of such roads as its proportion of the through rate; nor can the obligations imposed by the statute be evaded by the demand of the local charge for the haul over its own road by one or more of such carriers or by the declaration on the part of one or more of said carriers that as to the transportation over its road it is a local and not a through carrier. Troy Board of Trade v. Alabama Midland Ry., 4 Int. Com. Rep. 306, 6 I. C. C. Rep. 1 (1894). Neither is the continuity of the shipment broken by a sale of the goods *in transitu*. Gulf, C. & S. F. Ry. v. Fort Grain Co. (Tex. Civ. App.), 72 S. W. 419 (1903). If, however, the goods are consigned to a dealer and he, selling them before arrival, rebills to the purchaser without breaking bulk, the two carriages are distinct. Gulf, C. & S. F. Ry. v. State, 97 Tex. 274, 78 S. W. 495 (1904).

§ 899. End of the interstate transit.

On the principle already examined, the transit is a single unit, continuing from the time of the original shipment to the ultimate end of the carriage; and where the beginning and end are in different States, the entire transit from beginning to end is interstate. It does not cease to be interstate when the goods finally enter the State of destination; it continues an interstate transit even within that State, until delivery. Cattle Raisers' Assoc. v. Fort Worth & D. C. Ry., 7 I. C. C. Rep. 513 (1898); State v. Southern K. Ry. (Tex. Civ. App.), 49 S. W. 252 (1899).

TOPIC C—CONTINUOUS CARRIAGE UNDER COMMON CONTROL.

[See generally as to through transportation, chapter XIX.]

§ 900. Common arrangement.

When goods are shipped under a through bill of lading from a point in one State to a point in another, are received in transit by a State common

carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment, within the meaning of the act. Cincinnati, N. O. & T. P. Ry. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700, 5 Int. Com. Rep. 391 (1896); Louisville & N. R. R. v. Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209 (1899); United States v. Seaboard Ry., 82 Fed. 563 (1897); Interstate S. Y. Co. v. Indianapolis U. Ry., 99 Fed. 472 (1900); Troy Board of Trade v. Alabama Midland Ry., 4 Int. Com. Rep. 348, 6 I. C. C. 1 (1894); Daniels v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 458 (1895); Pennsylvania Millers' State Assoc. v. Philadelphia & R. R. R., 8 I. C. C. Rep. 531 (1900). The receipt successively by two or more carriers for transportation, of traffic shipped under through bills for continuous carriage over their lines, is assent to such a "common arrangement;" and previous formal arrangement between them is not necessary to bring such transportation under the terms of the Interstate Commerce Law. Trammell v. Clyde Steamship Co., 4 Int. Com. Rep. 120, 5 I. C. C. 324 (1892).

In the case of carriage of passengers a similar interpretation will be made; assent by a carrier to the issue of a through ticket over several railroads constitutes an arrangement for continuous carriage. Carrey v. Spencer, 72 N. Y. State Rep. 108, 36 N. Y. Supp. 886, 5 Int Com. Rep. 636 (1896); Missouri, K. & T. R. R. v. Fookes (Tex. Civ. App.), 40 S. W. 858 (1897).

The through billing and rating is the usual but by no means the only method of manifesting a common arrangement. Thus such common arrangement exists in a case where the initial carrier furnishes the shipper with a car specially fitted up for his business, which is taken over connecting roads on special through time tables. Boston Fruit & P. Exch. v. New York & N. E. R. R., 3 Int. Com. Rep. 493, 4 I. C. C. 664 (1890). So where a short line of railroad, entirely within a State, was operated entirely by an interstate railroad as a link in interstate carriage, there was common control. Heck v. East Tennessee, V. & G. Ry., 1 Int. Com. Rep. 775, 1 I. C. C. 495 (1887).

TOPIC D—CARRIERS SUBJECT TO THE ACT.

[See generally as to common carriage, chapter III-VI.]

§ 901. Kind of carrier subject to the Act.

A carrier of passengers is as much subject to the Act as a carrier of goods. Louisville, N. O. & T. T. R. R., v. State, 66 Miss. 662, 6 So. 203, 2 Int. Com. Rep. (1888). A street railway is subject to the act. Willson v. Rock Creek R. R., 7 I. C. C. Rep. 83 (1897).

An express business conducted by a railroad company is subject to the act, but not an independent express company. Re Express Companies, 1

Int. Com. Rep. 22, 1 I. C. C. 349 (1887); United States v. Morsman, 42 Fed. 448, 3 Int. Com. Rep. 112 (1890); Southern Ind. Exp. Co. v. United States Exp. Co., 88 Fed. 659, affirmed 92 Fed. 1022, 35 C. C. A. 172 (1898, 1899). Independent express companies are made subject to the Act by the Act of 1906.

A company which supplies a roadbed only, over which other companies carry, and not being itself a carrier, is not subject to the act. So of a bridge company. Kentucky & I. Bridge Co. v. Louisville & N. R. R., 37 Fed. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351 (1889), appeal dismissed 149 U. S. 777, 37 L. Ed. 964, 13 Sup. Ct. 1048 (1892). So of a stock-yards company. Cattle Raisers' Assoc. v. Fort Worth & D. C. Ry., 7 I. C. C. Rep. 513 (1898). If, however, such a company is chartered as a carrier, it appears to be subject to the Act, though the transportation is actually furnished by another. Heck v. East Tennessee, V. & G. Ry., 1 Int. Com. Rep. 775, 1 I. C. C. 495 (1887).

Similarly a company which simply furnishes cars for another company to haul, not being a carrier, is not subject to the act. Burton Stock Car Co. v. Chicago, B. & Q. R. R., 1 Int. Com. Rep. 329, 1 I. C. C. 132 (1887).

§ 902. Carriage wholly within the State.

Even though passengers or goods are being carried between two States, a carrier transporting them may nevertheless not be engaged in interstate commerce. Though a carrier receives goods directed to a point outside the State, he is not an interstate carrier if he is only to carry within the State and there deliver to an entirely independent succeeding carrier, with whom he has no common arrangement. Missouri & I. R. R. T. & L. Co. v. Cape Girardeau S. W. Ry., 1 Int. Com. Rep. 607, 1 I. C. C. 30 (1887); *Ex parte* Koehler, 30 Fed. 867, 1 Int. Com. Rep. 28 (1887). So if the carrier receives within the State of destination goods brought from without the State by an entirely independent carrier, the receiving carrier is not engaged in interstate commerce. Fort Worth & D. C. Ry. v. Whitehead, 6 Tex. Civ. App. 595, 26 S. W. 172 (1894).

This is commonly the case where the intrastate carrier does not issue a through bill of lading, or receive freight upon through bills issued by an interstate carrier. Interstate Commerce Commission v. Bellaire, Z. & C. Ry., 77 Fed. 942 (1897); United States v. Chicago, K. & S. R. R., 81 Fed. 783 (1897).

So where goods were shipped in New Jersey, directed to a consignee in New York, but carried only to Jersey City and there received by the consignees, the shipment is not interstate. New Jersey Fruit Exchange v. Central R. R., 2 Int. Com. Rep. 84, 2 I. C. C. 142 (1888).

A mere switching company which transfers goods from one carrier to another within the State, entirely without reference to their final destination, is not engaged in interstate commerce, whatever the destination of

the goods. Kentucky & I. Bridge Co. v. Louisville & N. R. R., 37 Fed. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 102 (1889), appeal dismissed 149 U. S. 777, 37 L. Ed. 964, 13 Sup. Ct. 1048 (1892). See, however, Interstate S. Y. Co. v. Indianapolis U. Ry., 99 Fed. 472 (1900).

§ 903. Local carrier taking part in through carriage.

Where, however, a local carrier takes part in the carriage of goods through to destination in another State, though his share of the carriage is entirely within the State, he is engaged in interstate commerce. Norfolk & W. R. R. v. Pennsylvania, 136 U. S. 114, 34 L. Ed. 394, 10 Sup. Ct. 958, 3 Int. Com. Rep. 178 (1890); *Ex parte* Koehler, 30 Fed. 867, 1 Int. Com. Rep. 28 (1887); Augusta So. R. R. v. Wrightsville & T. R. R., 74 Fed. 522 (1896); In re Annapolis, W. & B. R. R., 1 Int. Com. Rep. 315, 1 I. C. C. 315 (1887); Mattingly v. Pennsylvania Co., 2 Int. Com. Rep. 806, 3 I. C C. 598 (1890); James v. Cincinnati, N. O. & T. P. Ry., 3 Int. Com. Rep. 682, 4 I. C. C. 744 (1891); State v. Gulf, C. & S. F. Ry. (Tex. Civ. App.), 44 S. W. 542 (1898). This is often shown to be the case by a through billing and rating of the goods, assented to by the carrier in question. Cincinnati, N. O. & T. P. Ry. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700, 5 Int. Com. Rep. 391 (1896). In Texas it has been held that through billing is not enough, and a State carrier is not engaged in interstate commerce unless it takes part in a through rating. Gulf, C. & S. F. Ry. v. Nelson, 4 Tex. Civ. App. 345, 23 S. W. 732 (1893); Houston & T. C. Ry. v. Williams (Tex. Civ. App.), 31 S. W. 556 (1895); Houston & T. C. Ry. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308 (1895). But it is certain that the rating need not be a joint one; the State carrier is none the less an interstate carrier because his share of the total rate is equal to his entire local rate, if he takes part in or permits through billing. United States v. Seaboard Ry., 82 Fed. 563 (1897); Independent Refiners' Assoc. v. Western N. Y. & P. R. R., 6 I. C. C. Rep. 378 (1895). And it would seem to be unnecessary for the establishment of a through carriage, to prove that a technical through rate has been named.

CHAPTER XXVIII.

REASONABLE CHARGES AND FACILITIES.

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TOPIC E—REASONABLE FACILITIES.

§ 935. Not required by original act.
936. Switching privileges.

§ 911. Provisions of the statute.

Reasonable charges.—All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. [Interstate Commerce Act, section 1, as amended by Act of June 29, 1906, section 1.]

Switch connections.—Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. [Act of June 29, 1906, section 1.]

§ 912. Amendments of 1906.

The changes made by the act of 1906 are as follows:

1. From the original section are omitted, as unnecessary and covered by other parts of the act, the words "or for the receiving, delivering, storage, or handling of such property."

2. The entire provision as to connection with lateral branches and switches is new.

TOPIC A—THE SCHEDULE AS A WHOLE.

[See generally on this topic Chapters XI-XV.]

§ 913. Elements considered in establishing a general tariff of rates.

The elements to be considered in determining the reasonableness of an entire system of rates are widely different from those involved in the

question of the reasonableness of the rate upon a single commodity. Central Yellow Pine Asso. v. Illinois C. R. R., 10 I. C. C. Rep. 505 (1905). What those elements are has been fully examined in the earlier portion of this treatise (*ante*, Chapters XI-XV).

That railroad investments may be as secure as other property, the reasonable rates should be liberal until earnings are sufficiently large for a fair return on actual expenditure. Newland v. Northern P. R. R., 4 Int. Com. Rep. 474, 6 I. C. C. Rep. 131 (1894).

§ 914. Bearing of tariff as a whole on reasonable rates.

Under the power given in the Interstate Commerce Act to pass on the question of reasonable rates, the Commission seldom had to consider the schedule as a whole, since each case presented to the Commission is that of a particular rate, and the considerations which determine the reasonableness of a particular rate are seldom those which determine the reasonableness of the entire schedule of rates. The capital account of a railroad does not necessarily furnish a criterion by which the reasonableness of its freight rates is to be determined; and in order that the capitalization should be considered in cases involving the readjustment of rates, it must be accompanied by a history of the capital account. Grain Shippers' Asso. v. Illinois C. R. R., 8 I. C. C. Rep. 158 (1899). The mere fact of the need of additional revenue to meet additional expenses without diminishing net income does not justify an advance in a particular rate. Tift v. Southern Ry., 10 I. C. C. Rep. 548 (1905); Central Yellow Pine Assoc. v. Illinois Central R. R., 10 I. C. C. Rep. 505 (1905). The financial necessities and conditions of a carrier are not controlling to the extent that, independent of other circumstances, any rates are reasonable until the earnings are sufficient to operate the road and meet all the obligations of the carrier. Jerome Hill Cotton Co. v. Missouri, K. & T. Ry., 6 I. C. C. Rep. 601 (1896).

§ 915. Schedule as a whole may throw light on reasonableness of particular rate.

The gross income from the schedule as a whole may, however, be considered under some circumstances in determining the reasonableness of the particular rate. Jerome Hill Cotton Co. v. Missouri, K. & T. Ry., 6 I. C. C. Rep. 601 (1896). That railroad investments may be as secure as other property, the reasonable rates should be liberal until earnings are sufficiently large for a fair return on actual expenditure. Newland v. Northern P. R. R., 4 Int. Com. Rep. 474, 6 I. C. C. Rep. 131 (1894). In fixing reasonable rates the requirements of operating expenses, bonded debt, fixed charges, and dividend on capital stock from the total traffic, are all to be considered; but the claim that any particular rate is to be

measured by these as a fixed standard, below which the rate may not lawfully be reduced, is one rightly subject to some qualifications, one of which is that the obligations must be actual and in good faith. Re Rates and Charges on Food Products, 3 Int. Com. Rep. 93, 4 I. C. C. 116 (1890). See, also, Board of Railroad & Warehouse Comrs. v. Eureka Springs Ry., 7 I. C. C. Rep. 69 (1897); Brewer & Hanleiter v. Louisville & N. R. R., 7 I. C. C. Rep. 224 (1897); Cary v. Eureka Springs Ry., 7 I. C. C. Rep. 286 (1897); Brockway v. Ulster & D. Ry., 8 I. C. C. Rep. 21 (1898).

§ 916. Schedule as a whole important where rate is fixed by public authority.

Where the rate is fixed by the legislature or by a commission the most common inquiry is whether the schedule as a whole will bring in a fair income, and it is in such cases that this inquiry is mose frequently made. *Ante*, § 351 ff.; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898); Chicago & N. W. Ry. v. Dey, 35 Fed. 866, 2 Int. Com. Rep. 325 (1888); Pensacola & A. R. R. v. State, 27 Fla. 403, 9 So. 89, 2 Int. Com. Rep. 522 (1889). Under the power to regulate rates the Interstate Commerce Commission will probably have more frequent occasion to pass upon the reasonableness of the schedule as a whole.

TOPIC B—THE PARTICULAR RATES.

[See, on this topic generally, Chapters XVI-XX.]

§ 917. Customary rate presumably reasonable.

A railroad company by putting in force and continuing in force a rate of charges, furnishes evidence that the rate is profitable, and if it increases a long-established rate, the new rate will be presumed to be unreasonably high. Re Rates and Charges on Food Products, 3 Int. Com. Rep. 93, 4 I. C. C. 48 (1890); Coxe v. Lehigh Valley R. R., 3 Int. Com. Rep. 460, 4 I. C. C. 535 (1891); Railroad Commission v. Savannah, F. & W. Ry., 3 Int. Com. Rep. 688, 5 I. C. C. 13 (1891); National Hay Assoc. v. Lake Shore & M. S. R. R., 9 I. C. C. Rep. 264 (1902); Central Yellow Pine Assoc. v. Illinois Central R. R., 10 I. C. C. Rep. 505 (1905); Tift v. Southern Ry., 10 I. C. C. Rep. 548 (1905). So where a certain rate had been long established for delivery in New York, and the railroad company changed its practice and made delivery in Jersey City, but charged the same rate, this rate, being for less service, was held *prima facie* unreasonable. Truck Farmers' Assoc. v. Northeastern R. R., 6 I. C. C. Rep. 295 (1895). But a former special rate is not a fair test of the reasonableness of present rates, the act having abolished special and preferred rates. Myers v. Pennsylvania Co., 2 Int. Com. Rep. 403, 2 I. C. C. 573 (1889). Similarly, there is a presumption that rates fixed by a State commission

are reasonable, and the burden of proof is upon the railroad companies to show the contrary, but the presumption is not conclusive. Brabham v. Atlantic C. L. R. R., 11 I. C. C. Rep. 464 (1905)

§ 918. General principles.

Reasonable compensation for the service actually rendered is all that a common carrier is permitted to exact. Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. 418 (1898); Chicago & N. W. Ry. v. Osborne, 52 Fed. 914, 3 C. C. A. 347 (1892); Tift v. Southern Ry., 138 Fed. 754 (1905); Coxe v. Lehigh Valley R. R., 3 Int. Com. Rep. 460, 4 I. C. C. 535 (1891). This is the upper limit of his charge. On the other hand he is entitled to no more than a reasonable and fair return for his labor and his capital invested. Brabham v. Atlantic C. L. Ry., 11 I. C. C. Rep. 464 (1905).

A variety of practical considerations must enter into making of freight rates and determine to a great extent whether rates are reasonable; the earnings and expenses of operating, rates charged upon the same commodity upon other roads as nearly similarly situated as may be, the diversities between the railroad in question and such other roads, the relative amount of through and local business, the proportion borne by the commodity in question to the remainder of the local traffic, the market value of the commodity and its gradual reduction, the reductions made by the carrier upon other articles which are consumed and necessarily required by the producers of the article in question, and all other circumstances affecting the traffic of itself and as related to other considerations entering into the charges of the carrier. Evans v. Oregon Ry. & Nav. Co., 1 Int. Com. Rep. 641, 1 I. C. C. 325 (1897). All the surrounding circumstances must be considered as well as the rights of the shipper; and if these circumstances and conditions are so compulsory or imperious that they fairly and justly exercise any controlling influence in the making of the rate, they cannot be disregarded in a proceeding in which the reasonableness and justness of the rate is presented for determination. Business Men's Assoc. v. Chicago, S. P., M. & O. Ry., 2 Int. Com. Rep. 41, 2 I. C. C. 52 (1888).

In passing upon the reasonableness of rates, the question whether they afford the carrier a proper return for the service rendered is to be considered, as well as the result of the business to the shipper or producer of the traffic. Loud v. South Carolina Ry., 4 Int. Com. Rep. 205, 5 I. C. C. 529 (1892). Under no circumstances should they be so low as to impose a burden on other traffic. Re Rates and Charges on Food Products, 3 Int. Com. Rep. 93, 4 I. C. C. 48 (1890). But a railroad under the act cannot be compelled to increase its rates, though they are so low as to be ruinous to itself or its rivals. The provision that all rates shall be just and reasonable, was intended for the protection of the general public, and not for that of the carrier against the action of its own officers or the action of

rivals. Re Chicago, S. P. & K. C. Ry., 2 Int. Com. Rep. 137, 2 I. C. C. 231 (1888).

While on general principles a railroad is entitled to a fair return on the value of its investment, yet in the case of any particular rate which is alleged to be too high the value of its entire property can shed but little, if any, light upon the question whether the rate on one among thousands of articles of traffic yields its proper proportion of a fair return upon that value. Central Yellow Pine Assoc. v. Illinois Central R. R., 10 I. C. C. Rep. 505 (1905). Nor as has been said could the rate be determined by the amount of gross earnings and net income, even if they could be determined with reference to a single rate. If a rate is in itself excessive, as an unreasonable compensation for the service rendered, it cannot be justified as necessary to yield the railroad a reasonable income. If there are more roads than the business at fair rates will remunerate, they must rely upon future earnings for the return of investments and profits. New Orleans Cotton Exchange v. Cincinnati, N. O. & T. R. Ry., 2 Int. Com. Rep. 289, 2 I. C. C. 385 (1888).

§ 919. Comparison with other rates.

Where the reasonableness of rates is in question, comparison thereof may be made, not only with rates on another line of the same carrier, but also with those on the lines of other and distinct carriers. Cincinnati Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 4 Int. Com. Rep. 592, 6 I. C. C. Rep. 195 (1894); Morrell v. Union Pac. Ry., 4 Int. Com. Rep. 469, 6 I. C. C. Rep. 121 (1894). But in determining the reasonableness of rates a comparison of one isolated rate with another is not sufficient; the whole field must be considered in order to approximate justice, and at best the result cannot be regarded as other than an approximation. Howell v. New York, L. E. & W. R. R., 2 Int. Com. Rep. 162, 2 I. C. C. 272 (1888). Thus the unreasonableness of a rate for mileage tickets cannot be proved by showing that it is higher than the rate for commutation tickets. Assoc. of Wholesale Grocers v. Missouri Pac. Ry., 1 Int. Com. Rep. 321, 1 I. C. C. 156 (1897). And a finding that the rates charged by railroads for shipments to a particular point are unreasonable in themselves cannot properly be based on evidence which only tends to show that they are too high as compared with the rates charged between the initial points and one or two other points. Interstate Commerce Commission v. Nashville, C. & S. L. Ry., 120 Fed. 934, 57 C. C. A. 224 (1903).

Any comparison of rates must first be shown to be proper by establishing a similarity in the rates compared. Evans v. Union Pacific Ry., 6 I. C. C. Rep. 520 (1896). Thus rates on branch lines and main lines cannot be compared. Northwestern Ia. G. & S. S. Assoc. v. Chicago & N. W. Ry., 2 Int. Com. Rep. 431, 2 I. C. C. 604 (1888). Nor rates in different sections of the country. Morrell v. Union Pacific Ry., 4 Int. Com. Rep.

469, 6 I. C. C. Rep. 121 (1894). Nor can the rates in different directions be compared. Duncan v. Atchison, T. & S. F. R. R., 4 Int. Com. Rep. 385, 6 I. C. C. Rep. 85 (1894).

Of course, even in a case of admitted similarity, the difference in rates may be explained; as where the lower rate is a violation of the act. Squire v. Michigan Central R. R., 3 Int. Com. Rep. 515, 4 I. C. C. 611 (1890). Or where the lower rate was given by mistake. Rea v. Mobile & O. Ry., 7 I. C. C. Rep. 43 (1897).

§ 920. Special service.

A higher rate will be justified where special service is required, such as rapid transit, special cars, and speedy delivery for perishable freight. Delaware State Grange v. New York, P. & N. R. R., 3 Int. Com. Rep. 554, 4 I. C. C. 588 (1891); Loud v. South Carolina Ry., 4 Int. Com. Rep. 205, 5 I. C. C. 529 (1892); Newland v. Northern Pacific R. R., 4 Int. Com. Rep. 474, 6 I. C. C. Rep. 131 (1893). This increased rate must, nevertheless, remain reasonable. Board of Railroad Comrs. v. Florence Ry., 8 I. C. C. Rep. 1 (1898).

The amount of the reasonable rate must also be affected by other special circumstances. Thus in arriving at what is a just and reasonable rate on freight transported by a carrier on a short local line having but a small volume of business, where the cost of transportation is exceptionally great, arising from steep grades, sparse population, and light traffic, these are circumstances and conditions of controlling weight in the making of the rates, and cannot be overlooked when a question of their reasonableness is involved. Rice v. Western N. Y. & P. R. R., 2 Int. Com. Rep. 298, 2 I. C. C. 389 (1888); Savannah Bureau of Freight & Transp. v. Charleston & S. Ry., 7 I. C. C. Rep. 601 (1898); Georgia Peach Growers' Assoc. v. Atlantic C. L. Ry., 10 I. C. C. Rep. 255 (1904). In the same way a higher rate is justified where the carrier goes to expense in collecting his freight. Howell v. New York, L. E. & W. R. R., 2 Int. Com. Rep. 162, 2 I. C. C. 272 (1888).

§ 921. Incidental charges.

Where a carrier has a right to include in the rate items for special charges, whether for services furnished by the carrier himself or by another under an arrangement with the carrier, the compensation for such incidental services must be reasonable. Such incidental services are: *Terminal charges.*—Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895); Cattle Raisers' Assoc. v. Fort Worth & D. C. Ry., 7 I. C. C. Rep. 295 (1895); Re Transportation of Fruit, 10 I. C. C. Rep. 360 10 I. C. C. Rep. 83 (1904). *Elevator charges.*—In re Allowances to Elevators, 10 I. C. C. Rep. 309 (1904). *Demurrage charges.*—Pennsylvania

Millers' State Assoc. v. Philadelphia & R. R. R., 8 I. C. C. Rep. 531 (1900). *Storage charges.*—Blackman v. Southern Ry., 10 I. C. C. Rep. 352 (1904). *Refrigerating charges.*—Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895); Re Transportation of Fruit, 10 I. C. C. Rep. 360 (1904); Consolidated Forwarding Co. v. Southern Pacific Co., 10 I. C. C. Rep. 590 (1905). Such changes may properly be separately made. Interstate Commerce Commission v. Chicago, B. & Q. R. R., 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824 (1902), affirming 103 Fed. 249, 43 C. C. A. 209 (1900).

§ 922. Conditions.

Lower rate is good for released liability. Duncan v. Atchison, T. & S. F. Ry., 4 Int. Com. Rep. 385, 6 I. C. C. Rep. 85 (1894). And when ticket is bought before taking the train. Cist v. Michigan Central R. R., 10 I. C. C. Rep. 217 (1904). So a different rate may be made for summer and winter. Interstate Commerce Commission v. Louisville & N. R. R., 5 I. C. C. Rep. 656 (1896).

When a practice had existed on the part of certain carriers of live cattle to make a carload rate irrespective of weight, leaving the shipper to load into the car as many cattle as he pleased and was able to put into it, and the carriers substituted for this practice the rule that while naming a car-lot rate they prescribed a minimum weight for a carload, and then charged by the hundred pounds in proportion to the car-lot rate for any excess over the minimum, it was held that this rule was not unlawful. *Prima facie* the new rule is more just and reasonable than the practice it supplanted, since the charge is more in proportion to the service rendered. Leonard v. Chicago & A. R. R., 2 Int. Com. Rep. 599, 3 I. C. C. 241 (1889).

A carrier which had not provided track scales at stations prescribed a rule or regulation forbidding shippers to load grain in cars beyond a specified weight above the market capacity under a so-called "penalty" of increased rates on the excess weight. *Held*, that such rule or regulation, if properly established, is not unlawful, provided the increase in charges for excessive weight is not unreasonable, and the margin between such maximum and the carrier's minimum carload weight for grain is so wide that shippers may, without scales, readily comply with both rules. Suffern v. Indiana, D. & W. Ry., 7 I. C. C. 255 (1897), and see Phelps v. Texas & P. Ry., 4 Int. Com. Rep. 363, 6 I. C. C. Rep. 36 (1894); Rice v. Cincinnati, W. & B. R. R., 3 Int. Com. Rep. 841, 5 I. C. C. 193 (1891).

But unreasonable conditions should not be imposed. Thus, a shipper should not be subjected to unnecessary restrictions as to the kind of case or package he should use. Rhode Island Egg & B. Co. v. Lake Shore & M. S. R. R., 4 Int. Com. Rep. 512, 6 I. C. C. Rep. 176 (1894). A different rate on coal loaded by tipple is not reasonable. Glade Coal Co. v. Baltimore & O. R. R., 10 I. C. C. 226 (1904). And a difference based on the

ultimate destination of the goods is not justified. Hope Cotton Oil Co. v. Texas & P. Ry., 10 I. C. C. Rep. 696 (1905).

When a conditional rate is justified, the difference must be no more than is reasonable under the circumstances. New Orleans Cotton Exch. v. Illinois Central R. R., 2 Int. Com. Com. Rep. 777, 3 I. C. C. 534 (1891). And if a difference in rate is authorized, it is only while the circumstances justifying it exist. Re Relative Tank & Barrel Rates, 2 Int. Com. Rep. 245, 2 I. C. C. 365 (1888).

§ 923. Route.

If a shipper gives no directions as to the particular route by which the freight is to be sent forward, it is the duty of the freight agent to forward it by the best and cheapest route for the shipper. Pankey v. Richmond & D. R. R., 3 Int. Com. Rep. 33, 3 I. C. C. 173 (1890); Newland v. Northern P. Ry., 6 I. C. C. Rep. 131 (1894). Therefore a carrier which sends freight over its own line, which is much longer and more expensive to operate than another route over continuous lines operated in part by other common carriers with which it exchanges traffic, can charge only a rate which is reasonable for transportation by the shorter and less expensive route. Minneapolis Chamber of Commerce v. Great Northern R. R., 4 Int. Com. Rep. 230, 5 I. C. C. 571 (1892); Newland v. Northern Pac. Ry., 6 I. C. C. Rep. 131 (1894). And if a higher rate is charged, the carrier must refund the excess. Pankey v. Richmond & D. R. R., 3 Int. Com. Rep. 33, 3 I. C. C. 173 (1890); Dewey v. Baltimore & O. R. R., 11 I. C. C. Rep. 481 (1905). If, however, the shipper gives instructions as to the route, the carrier is entitled to a rate that is reasonable over the route chosen. Pankey v. Richmond & D. R. R., 3 Int. Com. Rep. 33, 3 I. C. C. 173 (1890); Dewey v. Baltimore & O. R. R., 11 I. C. C. Rep. 481 (1905).

§ 924. Cost of service.

The cost of the service to the carrier is to be considered. Interstate Commerce Commission v. Chicago G. W. Ry., 141 Fed. 1003 (1905). It is indeed the minimum rate; since a carrier cannot be required to carry at a loss (*ante*, § 501 ff). But a rate higher than the cost of carriage is of course justifiable. Interstate Commerce Commission v. Western & Atlantic R. R., 88 Fed. 186 (1898).

§ 925. Value of service to shipper.

The value of the service to the shipper should be considered; which includes a consideration of the profit which the shipper can make by having his goods transported to their destination. Re Rates and Charges on Food Products, 3 Int. Com. Rep. 93, 4 I. C. C. 48 (1890). This is considered by District Judge Bethea and the railroad attorneys "an ideal

method;" "practical, and is based on an idea similar to taxation." Interstate Commerce Commission v. Chicago G. W. Ry., 141 Fed. 1003 (1905). Nevertheless, the correctness of this view may be doubted (*ante*, § 524), and it is tolerably well settled by authority that it is no more than a fact to be considered, and by no means a controlling factor in the determination of the reasonableness of a rate. Florida Fruit Exchange v. Savannah, F. & W. Ry., 4 Int. Com. Rep. 400 (1892), affirmed 9 C. C. A. 691, 4 Int. Com. Rep. 589 (1894); reversed on another point, 167 U. S. 512, 42 L. Ed. 257, 17 Sup. Ct. 998 (1898); Tift v. Southern Ry., 138 Fed. 753 (1905); Cincinnati Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 4 Int. Com. Rep. 592, 6 I. C. C. Rep. 195 (1894); F. Schumacher Milling Co. v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 61 (1894); In re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382 (1903); Central Yellow Pine Assoc. v. Illinois Central R. R., 10 I. C. C. Rep. 505 (1905); Tift v. v. Southern Ry., 10 I. C. C. Rep. 548 (1905).

§ 926. Value of goods.

The value of the goods carried is to be considered in determining the reasonableness of the rate, since the greater the value the greater the risk. Interstate Commerce Commission v. Delaware, L. & W. R. R., 64 Fed. 723, 5 I. C. C. Rep. 144 (1894); Interstate Commerce Commission v. Chicago G. W. Ry., 141 Fed. 1003 (1905); Howell v. New York, L. E. & W. Ry., 2 Int. Com. Rep. 162, 2 I. C. C. 272 (1888); Colorado F. & I. Co. v. Southern Pacific Co., 6 I. C. C. Rep. 488 (1895). But the value of the goods cannot be made an arbitrary standard for fixing the compensation. Grain Shippers' Assoc. v. Illinois Central R. R., 8 I. C. C. Rep. 158 (1899); Georgia Peach Growers' Assoc. v. Atlantic C. L. Ry., 10 I. C. C. Rep. 255 (1904).

§ 927. Amount.

As it is cheaper to move goods in bulk rather than in small lots, a smaller relative rate is permissible upon carload lots than on less than carload lots; but this difference must be no more than is reasonable. Duncan v. Atchison, T. & S. F. R. R., 4 Int. Com. Rep. 385, 6 I. C. C. 85 (1894); Business Men's League v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 318 (1903). Before allowing a carload rating for a carload shipment, a carrier is allowed to require that goods shall be loaded at one time and place, that but a single bill of lading shall be allowed, and that the shipment shall be by one consignor to one consignee. Buckeye Buggy Co. v. Cleveland, C., C. & St. L. Ry., 9 I. C. C. Rep. 620 (1903); C. S. Bell Co. v. Baltimore & O. S. Ry., 9 I. C. C. Rep. 632 (1903). So while a carrier should receive a greater compensation in the aggregate for hauling things being equal, as a general rule, the rate per hundred weight should

a carload of large tonnage than one of less tonnage, nevertheless, other be less in the former than in the latter case. Murphy v. Wabash R. R., 3 Int. Com. Rep. 725, 5 I. C. C. 122 (1891). The large bulk in which a commodity moves by railroad will for the same reason justify a lower rate. Re Rates and Charges on Food Products, 3 Int. Com. Rep. 93, 4 I. C. C. 48 (1890). Nevertheless though carload rates will be justified, it is usually held that a carrier cannot be forced to grant lower rates for a carload. Railroad Commrs. v. Weld, 96 Tex. 394, 73 S. W. 529 (1902); or for a larger carload than the ordinary load. Planter's Compress Co. v. Cleveland, C., C. & St. L. Ry., 11 I. C. C. Rep. 382 (1905). But see Barrow v. Yazoo & M. V. R. R., 10 I. C. C. Rep. 333 (1904).

§ 928. Distance.

As a rule, in the transportation of freight by railroads, while the aggregate charge is continually increasing the farther the freight is carried, the rate per ton per mile is constantly growing less all the time, making the aggregate charge less in proportion every hundred miles after the first, arising out of the character and nature of the service performed, and the cost of the service; and thus staple commodities and merchandise are enabled to bear the charges of this mode of transportation from and to the most distant portions of the country. The act to regulate commerce, so far from throwing hampering restrictions or obstacles in the way of the operation of this salutary rule, gives it all the benefit and aid of its sanction and safeguards by providing that the carrier shall be entitled to receive a reasonable compensation for the service performed upon open published rates, against which no competitor can take advantage by allowing shippers secret rebates and drawbacks in order to get the business. In the nature of things rates on long hauls usually are, and as a rule should be, lower in proportion to distance than local rates on short hauls of the same commodity. Farrar v. East Tenn. V. & G. Ry., 1 Int. Com. Rep. 764, 1 I. C. C. 480 (1888); Crews v. Richmond & D. R. R., 1 Int. Com. Rep. 703, 1 I. C. C. 401 (1888). For this reason the rate per ton mile is not controlling, and cannot be enforced upon carriers by the Commission. La Crosse, M. & J. Union v. Chicago, M. & S. P. Ry., 2 Int. Com. Rep. 9, 1 I. C. C. 629 (1888): Gustin v. Atchison, T. & S. F. R. R., 8 I. C. C. Rep. 277 (1899). But distance is of great importance in fixing rates and must be considered. Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 7 I. C. C. Rep. 180 (1897); and see Milwaukee Chamber of Commerce v. Chicago, M. & St. P. Ry., 7 I. C. C. 481 (1898); New York Produce Exchange v. Baltimore & O. R. R., 7 I. C. C. Rep. 612 (1898).

§ 929. Through rates.

When several carriers agree upon a through rate, the reasonableness of the rate must be determined in the first instance as if the rate stood by

itself, and were the rate of a single carrier. It must be reasonable as a whole in order to satisfy the requirements of the act. Lippman v. Illinois Central R. R., 2 Int. Com. Rep. 414, 2 I. C. C. 584 (1889). The division among themselves which a number of connecting carriers make of a through rate should not affect the question of the reasonableness or unreasonableness of the rate as an entirety. Florida Fruit Exch. v. Savannah, F. & W. Ry., 4 Int. Com. Rep. 400 (1893). Re Transportation of Salt, 10 I. C. C. Rep. 148 (1904). The division may, to be sure, throw some light on the reasonableness of the whole rate. And if part of the through line is owned by the shipper, as an industrial railroad (*ante*, § 112), the division of the rate may be scrutinized to be sure that under the form of division there is not in fact a rebate allowed. Re Transportation of Salt, 10 I. C. C. Rep. 148 (1904).

A joint through rate is not necessarily or usually the sum of the local rates; indeed, as a longer haul is ordinarily carried on relatively more cheaply than a shorter one the sum of the local rates should ordinarily exceed the through rate. Lippman v. Illinois Central R. R., 2 Int. Com. Rep. 414, 2 I. C. C. 584 (1889); Troy Board of Trade v. Alabama Midland Ry., 4 Int. Com. Rep. 348, 6 I. C. C. 1 (1894); Hilton Lumber Co. v. Wilmington & W. R. R., 9 I. C. C. Rep. 17 (1901). And a through rate which is greater than the sum of the local rates is ordinarily for that reason unjust and unreasonable. Savannah Bureau of Freight & Transp. v. Louisville & N. R. R., 8 I. C. C. Rep. 377 (1899). But where the local rates are fixed not by the railroads themselves but by railroad commissioners of the States, a through rate greater than the sum of the local rates may in an exceptional case be reasonable. Savannah Bureau of Freight & Transp. v. Charleston & S. Ry., 7 I. C. C. Rep. 601 (1898).

TOPIC C—CLASSIFICATION.

[See Chapter XVIII, where classification is discussed at length.]

§ 930. General principles of classification.

The general principles of classification have already been fully stated in a former chapter. It has been seen that a classification of commodities is necessary in order to fix particular rates. This division must not be unduly minute, as that would greatly complicate the work, and go far to defeat the very purpose of classification, and even then it would be impracticable to apportion with mathematical exactness the burdens of transportation; the best result obtainable in this direction is reasonable and substantial approximation. Derr Mfg. Co. v. Pennsylvania R. R., 9 I. C. C. 646 (1903); see also § 557. The classification being made, a rate must be fixed for each class; and the difference in rates between the different classes must be reasonable, in addition to the requirement that

the rates in themselves should be reasonable. Business Men's League v. Atchison, T. & S. F. R. R., 9 I. C. C. 318 (1903).

§ 931. Instances.

The Interstate Commerce Commission has examined and passed upon the classification of the following articles:

Barrel Stock, Base Boards, Bed Slats and Butternut Lumber—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. 489 (1905).

Beans—Rea v. Mobile & O. Ry., 7 I. C. C. Rep. 43 (1897).

Bitters—Myers v. Pennsylvania Co., 2 Int. Com. Rep. 403, 2 I. C. C. 573 (1889).

Carpenters' Mouldings, Casings, Cherry Lumber—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Celery—Tecumseh Celery Co. v. Cincinnati, J. & M. Ry., 4 Int. Com. Rep. 318, 5 I. C. C. 663 (1893).

Cowpeas—Swaffield v. Atlantic Coast Line Ry., 10 I. C. C. Rep. 281 (1904).

Eggs—Brownell v. Columbus & C. M. R. R., 4 Int. Com. Rep. 285, 5 I. C. C. 638 (1893).

Fence Posts—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Fertilizer—Swaffield v. Atlantic C. L. Ry., 10 I. C. C. Rep. 281 (1904).

Fruits, Dried—Martin v. Southern Pac. Co., 1 Int. Com. Rep. 596, 2 I. C. C. 1 (1887).

Fruit and Vegetable Packages—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Grain and Grain Products—McMorran v. Grand T. Ry., 2 Int. Com. Rep. 604, 3 I. C. C. 252 (1889).

Groceries—Thurber v. New York C. & H. R. R. R., 2 Int. Com. Rep. 742, 3 I. C. C. 473 (1890).

Hides—McMillan v. Western Classif. Committee, 3 Int. Com. Rep. 282, 4 I. C. C. 276 (1890).

Hogs—Chicago Board of Trade v. Chicago & A. R. R., 3 Int. Com. Rep. 233, 4 I. C. C. 158 (1890).

Hoops, Hubs—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Hub Blocks—Bates v. Pennsylvania R. R., 2 Int. Com. Rep. 715, 4 I. C. C. 281 (1889).

Laths—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Leather Scrap—Newman v. New York C. & H. R. R. R., 11 I. C. C. Rep. 517 (1906).

Lemons—Consolidated Forwarding Co. v. Southern Pac. Co., 10 I. C. C. Rep. 590 (1905).

Logs—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Lumber—Hurlbut v. Lake Shore & M. S. Ry., 2 Int. Com. Rep. 81, 2 I. C. C. 122 (1888).

Mahogany Lumber—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Packinghouse Products—Chicago Board of Trade v. Chicago & A. R. R., 3 Int. Com. Rep. 233, 4 I. C. C. 158 (1890).

Paper Bags—Wolf Bros. v. Allegheny Valley Ry., 7 I. C. C. Rep. 40 (1897).

Patent Medicine—Warner v. New York C. & H. R. R. R., 3 Int. Com. Rep. 74, 3 I. C. C. 32 (1890).

Paving Blocks—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Pearline—Pyle v. East Tenn., V. & G. Ry., 1 Int. Com. Rep. 767, 1 I. C. C. 465 (1888).

Petroleum and Petroleum Products—Rice v. Western N. Y. & Pa. R. R., 3 Int. Com. Rep. 162, 4 I. C. C. 131 (1890).

Pickets, Piles, Plow Beams and Handles—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Railroad Ties—Reynolds v. Western N. Y. & P. Ry., 1 Int. Com. Rep. 685, 1 I. C. C. 393 (1887).

Raisins—Martin v. Southern Pac. Co., 1 Int. Com. Rep. 596, 2 I. C. C. 1 (1887).

Salt—Anthony Salt Co. v. Missouri Pac. Ry., 4 Int. Com. Rep. 33, 5 I. C. C. 299 (1892).

Sawdust, Sleigh Wood, Spokes, Spools for Barb Wire, Staves—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Soap—Pyle v. East Tenn., V. & G. Ry., 1 Int. Com. Rep. 767, 1 I. C. C. 465 (1888); Andrews Soap Co. v. Pittsburg, C. & S. L. Ry., 3 Int. Com. Rep. 77, 4 I. C. C. 41 (1890); Proctor v. Cincinnati, H. & D. R. R., 3 Int. Com. Rep. 131, 4 I. C. C. 87 (1890); Beaver v. Pittsburg, C. & S. L. Ry., 3 Int. Com. Rep. 546, 4 I. C. C. 733 (1891).

Surgical Chairs—Harvard Co. v. Pennsylvania Co., 3 Int. Com. Rep. 257, 4 I. C. C. 212 (1890).

Telegraph and Telephone Poles, Wagon Wood, Walnut Lumber, Window Stock—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Wagon Materials—Hurlburt v. Lake Shore & M. S. Ry., 2 Int. Com. Rep. 81, 2 I. C. C. 122 (1888).

TOPIC D—UNREASONABLE RATES.

[Particular rates are discussed in Chapters XI, XVI, XVII, XVIII, XIX.]

§ 932. General principles.

No one can refuse to pay the published tariff rates, on the ground that they are unreasonable; since it would be a crime to accept from him less than the tariff rates. Van Patten v. Chicago, M. & S. P. Ry., 81 Fed. 545 (1897). It is necessary, therefore, in order to obtain redress where rates are unreasonably high to apply to the Interstate Commerce Commission for redress. Upon a complaint to the Commission for reduction of rates the burden is on the complainant to establish his case; it must affirmatively appear that charges assailed as unreasonable are so and ought to be reduced. Lincoln Creamery v. Union P. Ry., 3 Int. Com. Rep. 794, 5 I. C. C. 156 (1891); Duncan v. Atchison, T. & S. F. R. R., 6 I. C. C. Rep. 85 (1894). Where a change of rates would involve a reduction of rates on other competing lines not parties to the proceeding, and unsettle relative rates in a large extent of territory, such a change ought not to be made unless based upon clear grounds. Rice v. Western N. Y. & P. Ry., 2 Int. Com. Rep. 298, 2 I. C. C. 389 (1888); and see Dallas Freight Bureau v. Texas & P. Ry., 8 I. C. C. Rep. 33 (1898). In a proper case, however, the Commission will declare a rate unreasonable. Jerome Hill Cotton Co. v. Missouri, K. & T. Ry., 6 I. C. C. Rep. 601 (1896); New Orleans L. S. Exch. v. Texas & P. Ry., 10 I. C. C. Rep. 327 (1904); H. B. Pitts & Son v. Atchison, T. & S. F. R. R., 10 I. C. C. Rep. 691 (1905).

While, as has been seen, the reasonableness of a rate may be tested by comparison with similar rates, such comparison alone, without other evidence, will not justify the conclusion that a rate is unreasonable. Allen v. Oregon Ry. & Nav. Co., 106 Fed. 265 (1901); Interstate Commerce Commission v. Nashville, C. & S. L. Ry., 120 Fed. 934, 57 I. C. C. A. 224 (1903); Kentucky R. R. Comrs. v. Cincinnati, N. O. & T. P. Ry., 7 I. C. C. Rep. 380 (1897); Chattanooga Chamber of Commerce v. Southern Ry., 10 I. C. C. Rep. 111 (1904).

§ 933. Passenger rates.

Several decisions on the reasonableness of passenger rates are interesting. Thus twenty-five dollars is not unreasonable for a mileage ticket. Associated Wholesale Grocers v. Missouri Pac. Ry., 1 Int. Com. Rep. 321, 393, 1 I. C. C. 156 (1887). A passenger fare from A to B is not necessarily unreasonable because it is higher than that from B to A. MacLoon v. Boston & M. R. R., 9 I. C. C. Rep. 642 (1903); Hewins v. New York, N. H. & H. R. R., 10 I. C. C. Rep. 221 (1904). A through rate is not necessarily unreasonable because it is higher than the sum of local rates fixed by State laws. Savannah Bureau of Freight & Transp. v.

Charleston & S. R. R., 7 I. C. C. Rep. 601 (1898); see, however, Board of Railroad Commissioners v. Eureka Springs Ry., 7 I. C. C. Rep. 69 (1897). See for other discussions of the reasonableness of passenger rates, Willson v. Rock Creek Ry., 7 I. C. C. Rep. 83 (1897); Cist v. Michigan Cent. R. R., 10 I. C. C. Rep. 217 (904).

§ 934. Freight rates; instances.

In the following cases the reasonableness of rates on particular articles was considered by the Interstate Commerce Commission:

Agate Ware—Chamber of Commerce of Chattanooga v. Southern Ry., 10 I. C. C. Rep. 117 (1904).

Agricultural Implements—Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902).

Angle Beads—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Apples—Truck Farmers' Asso. v. Northwestern Ry., 6 I. C. C. Rep. 295 (1895); National Hay Asso. v. Lake Shore & Michigan S. R. R., 9 I. C. C. Rep. 264 (1902).

Asbestos—Chicago Fire Proof Covering Co. v. Chicago & N. W. Ry., 8 I. C. C. Rep. 316 (1899).

Astragals—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Bacon—Rates on. Savannah Bureau of Freight & Transp. v. Louisville & N. R. R., 8 I. C. C. Rep. 377 (1899).

Baking Powder—Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903); Re Transportation of Salt from Hutchinson, 10 I. C. C. Rep. 1 (1904); Chamber of Commerce of Chattanooga v. Southern Ry., 10 I. C. C. Rep. 117 (1904).

Balusters—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Bananas—Gardner & Clark v. Southern Ry., 10 I. C. C. Rep. 342 (1904).

Barley—F. Schumacher Milling Co. v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 61 (1894); Cannon Falls Farmers' Elevator Co. v. Chicago G. W. Ry., 10 I. C. C. Rep. 650 (1905).

Barrel Material—Holmes & Co. v. Southern Ry., 8 I. C. C. Rep. 561 (1900).

Beans—Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895); Rea v. Mobile & O. Ry., 7 I. C. C. Rep. 43 (1896); Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902); Chattanooga Chamber of Commerce v. Southern Ry., 10 I. C. C. Rep. 117 (1904).

Beef Cattle—New Orleans Live Stock Exch. v. Texas & Pac. Ry., 10 I. C. C. Rep. 327 (1904).

Blacking Brushes—Derr Mfg. Co. v. Pennsylvania R. R., 9 I. C. C. Rep. 646 (1903).

Blankets—Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903).

Blinds—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Boards—Central Yellow Pine Assoc. v. Illinois C. R. R., 10 I. C. C. Rep. 519 (1905).

Books—Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903).

Boots and Shoes—Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902).

Bottles—Of milk, rates on. Milk Producers' Protective Assoc. v. Delaware, L. & W. Ry., 7 I. C. C. Rep. 92 (1897).

Box Shooks—Michigan Box Co. v. Flint & P. M. R. R., 6 I. C. C. Rep. 335 (1895).

Bran—National Hay Assoc. v. Lake Shore & Michigan S. R. R., 9 I. C. C. Rep. 264 (1902).

Brandy—Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902).

Brushes—Derr Mfg. Co. v. Pennsylvania R. R., 9 I. C. C. Rep. 646 (1903).

Buckwheat Grits—F. Schumacher Milling Co. v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 61 (1894).

Buggies—Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902); Holdzkom v. Michigan Central R. R., 9 I. C. C. Rep. 42 (1901).

Cabbage—Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895).

Candles—Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902).

Canned Goods—Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902); Chamber of Commerce of Chattanooga v. Southern Ry., 10 I. C. C. Rep. 111 (1904).

Cans—Of milk, rates on. Milk Producers' Protective Assoc. v. Delaware, L. & W. Ry., 7 I. C. C. Rep. 92 (1897).

Cantaloupes—Rea v. Mobile & O. Ry., 7 I. C. C. Rep. 43 (1897).

Carpenters' Mouldings—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Carriages—Holdzkom v. Michigan Central R. R., 9 I. C. C. Rep. 42 (1901); Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902).

Cartridges—Chamber of Commerce of Chattanooga v. Southern Ry., 10 I. C. C. Rep. 118 (1904).

Cattle—Leonard v. Chicago & A. R. R., 3 I. C. C. Rep. 241, 2 Int. Com.

Rep. 599 (1889); Squire v. Michigan Cent. R. R., 4 I. C. C. Rep. 611, 3 Int. Com. Rep. 515 (1891); Cattle Raisers' Assoc. v. Fort Worth & D. C. Ry., 7 I. C. C. Rep. 513 (1898); Sayles v. N. Y., N. H. & H. R. R., 9 I. C. C. Rep. 492 (1903); Chicago Live Stock Exchange v. Chicago G. W. Ry., 10 I. C. C. 428 (1905).

Cedar Lumber, Poles, Posts and Shingles—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. 489 (1905).

Cement—Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903).

Cereal Products—F. Schumacher Milling Co. v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 61 (1894).

Chair Stuff—Murphy v. Wabash R. R., 5 I. C. C. 122, 3 Int. Com. Rep. 725 (1891).

Champagne—Shippers' Union of Phoenix v. Atchison, T. & S. F. Ry., 9 I. C. C. Rep. 250 (1902).

Cheese—Shippers' Union of Phoenix v. Atchison, T. & S. F. Ry., 9 I. C. C. Rep. 250 (1902).

Chewing Gum—Wrigley v. Cleveland, C., C. & St. L. Ry., 10 I. C. C. Rep. 412 (1905).

Chocolate—Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903).

Citrus Fruit—Consolidated Forwarding Co. v. Southern P. Co., 9 I. C. C. Rep. 182 (1902).

Closet Fittings, Seats and Tanks—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Coal—Rend v. Chicago & N. W. Ry., 2 I. C. C. 540, 2 Int. Com. Rep. 313 (1889); Imperial Coal Co. v. Pittsburgh & L. E. R. R., 2 I. C. C. 618, 2 Int. Com. Rep. 436 (1889); Coxe v. Lehigh Valley R. R., 4 I. C. C. 535, 3 Int. Com. Rep. 460 (1890); In re Louisville & N. R. R., 5 I. C. C. 466, 4 Int. Com. Rep. 157 (1892); Fewell v. Richmond & D. Ry., 7 I. C. C. Rep. 354 (1897); Montell v. Baltimore & O. Ry., 7 I. C. C. Rep. 412 (1897); McGrew v. Missouri P. Ry., 8 I. C. C. Rep. 630 (1901); Mayor and City Council of Wichita v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 553 (1903); Glade Coal Co. v. Baltimore & O. Ry., 10 I. C. C. Rep. 226 (1904); Denison Light & Power Co. v. Missouri, K. & T. Ry., 10 I. C. C. Rep. 337 (1904); Re Transportation of Coal and Mine Supplies, 10 I. C. C. Rep. 473 (1905).

Cocoa—Kindel v. Atchison, T. & S. F. Ry., 9 I. C. C. Rep. 606 (1903).

Coffee—Johnston-Larimer Dry Goods Co. v. Atchison, T. & S. F. Ry., 6 I. C. C. Rep. 568 (1896); Danville v. Southern Ry., 8 I. C. C. Rep. 409 (1900); Shippers' Union of Phoenix v. Atchison, T. & S. F. Ry., 9 I. C. C. Rep. 250 (1902); Chamber of Commerce of Chattanooga v. Southern Ry., 10 I. C. C. Rep. 117 (1904).

Copper—Kindel v. Atchison, T. & S. F. Ry., 9 I. C. C. Rep. 606 (1903).

Corn—Bates v. Pennsylvania R. R., 3 I. C. C. 435, 2 Int. Com. Rep. 715 (1889); In re Alleged Excessive Freight Rates, 4 I. C. C. 48, 3 Int. Com.

Rep. 93 (1890); Suffern, H. & Co. v. Indiana, D. & W. Ry., 7 I. C. C. Rep. 255 (1897); Grain Shippers' Assoc. v. Illinois C. R. R., 8 I. C. C. Rep. 158 (1899); Re Export Rates from Points East and West of Miss. River, 8 I. C. C. Rep. 185 (1899); Re Export and Domestic Rates on Grain, 8 I. C. C. Rep. 214 (1899); Board of R. Comrs. v. Atchison, T. & S. F. Ry., 8 I. C. C. Rep. 304 (1899); Mobile & O. R. Co., Re Rates and Practices of, 9 I. C. C. Rep. 375 (1903); National Hay Assoc. v. Lake Shore & Michigan S. Ry., 9 I. C. C. Rep. 264 (1902); Swaffield v. Atlantic Coast Line Ry., 10 I. C. C. Rep. 281 (1904); H. B. Pitts & Son v. St. Louis & S. F. Ry., 10 I. C. C. Rep. 684 (1905).

Corn Meal—Board of R. Comrs. v. Atchison, T. & S. F. Ry., 8 I. C. C. Rep. 304 (1899); Aberdeen Group Commercial Assoc. v. Mobile & O. Ry., 10 I. C. C. Rep. 289 (1904).

Corn Products—Bates v. Pennsylvania R. R., 3 I. C. C. 435, 2 Int. Com. Rep. 715 (1889).

Cornice Brackets—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Cotton—New Orleans Cotton Exch. v. Illinois C. R. R., 3 I. C. C. 534, 2 Int. Com. Rep. 777 (1890); Troy Bd. of Trade v. Alabama M. Ry., 6 I. C. C. Rep. 1 (1894); Phelps v. Texas & P. Ry., 6 I. C. C. Rep. 36 (1894); Re Alleged Unlawful Rates, 8 I. C. C. Rep. 121 (1899); Dallas Freight Bureau v. Texas & P. Ry., 8 I. C. C. Rep. 33 (1898); Savannah Bureau of Freight & Transp. v. Louisville & N. R. R., 8 I. C. C. Rep. 377 (1899).

Cotton Piece Goods—Johnston-Larimer Dry Goods Co. v. Atchison, T. & S. F. Ry., 6 I. C. C. Rep. 568 (1896); Kindel v. Boston & A. R. R., 11 I. C. C. Rep. 495 (1905).

Cotton Seed—Hope Cotton Oil Co. v. Texas & P. Ry., 10 I. C. C. Rep. 696 (1905).

Cotton Seed Meal—Boyer & Co. v. Chesapeake, O. & S. W. Ry., 7 I. C. C. Rep. 55 (1897).

Cowpeas—Swaffield v. Atlantic Coast Line Ry., 10 I. C. C. Rep. 281 (1904).

Cream—Milk Producers' Protective Assoc. v. Delaware, L. & W. R. R., 7 I. C. C. Rep. 92 (1897).

Cucumbers—Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895); Rea v. Mobile & O. Ry., 7 I. C. C. Rep. 43 (1897).

Cymbling—Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895).

Dog Collars—Business Men's League of St. Louis v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 330 (1903).

Doors—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Door Frames—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Door Posts—Business Men's League of St. Louis v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 330 (1903).

Dressed Meat—In the Matter of Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382 (1903); Chicago Live Stock Exchange v. Chicago G. W. Ry., 10 I. C. C. Rep. 428 (1905).

Earthenware—Chamber of Commerce of Chattanooga v. Southern Ry., 10 I. C. C. Rep. 117 (1904).

Egg Cases—Rhode Island Egg and B. Co. v. Lake Shore & M. S. Ry., 6 I. C. C. Rep. 176 (1894).

Egg Plant—Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895).

Emigrant's Movables—Duncan v. Atchison, T. & S. F. Ry., 6 I. C. C. Rep. 85 (1894).

Envelopes—Wolf Bros. v. Allegheny Valley Ry., 7 I. C. C. Rep. 40 (1897).

Extracts—Kindel v. Atchison, T. & S. F. Ry., 9 I. C. C. Rep. 606 (1903).

Farina—F. Schumacher Milling Co. v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 61 (1894).

Feed—Re Fremont E. and M. V. Ry., 6 I. C. C. Rep. 293 (1895); National Hay Assoc. v. Lake Shore & M. S. Ry., 9 I. C. C. Rep. 264 (1902).

Fencing—Central Y. P. Assoc. v. Illinois Cent. R. R., 10 I. C. C. Rep. 519 (1905).

Fertilizer—Savannah Bureau of F. & T. v. Charleston & S. Ry., 7 I. C. C. Rep. 458 (1897).

Flooring—Central Y. P. Assoc. v. Illinois Cent. Ry., 10 I. C. C. Rep. 519 (1905).

Flour—Milwaukee Chamber of Commerce v. Flint & P. M. R. R., 2 Int. Com. Rep. 393, 2 I. C. C. 553 (1889); In re Alleged Excessive Freight Rates, 3 Int. Com. Rep. 93, 4 I. C. C. 48 (1890); In re Freight Rates and Charges, 3 Int. Com. Rep. 151, 4 I. C. C. 116 (1890); King v. New York, N. H. & H. R. R., 3 Int. Com. Rep. 272, 4 I. C. C. 251 (1890); Hezel Milling Co. v. St. Louis, A. & T. H. R. R., 3 Int. Com. Rep. 701, 5 I. C. C. 57 (1891); F. Schumacher Milling Co. v. Chicago, R. I. & P. R. R., 6 I. C. C. Rep. 61 (1894); Chamber of Commerce v. Chicago, M. & S. P. Ry., 7 I. C. C. Rep. 481 (1898); New York Produce Exch. v. Baltimore & O. R. R., 7 I. C. C. Rep. 612 (1898); Board of Railroad Commissioners v. Atchison, T. & S. F. R. R., 8 I. C. C. Rep. 304 (1899); Re Export and Domestic Rates on Grain, 8 I C. C. Rep. 214 (1899); Pennsylvania Millers' State Assoc. v. Philadelphia & R. R. R., 8 I. C. C. Rep. 531 (1900); National Hay Assoc. v. Lake Shore & M. S. R. R., 9 I. C. C. Rep. 264 (1902); Wichita v. Missouri Pac. Ry., 10 I. C. C. Rep. 35 (1904); Aberdeen Group Commercial Assoc. v. Mobile & O. Ry., 10 I. C. C. Rep. 289 (1904).

Fresh Meats—Chicago L. S. Exch. v. Chicago G. W. Ry., 10 I. C. C. Rep. 428 (1905).

Fruit—Boston F. & P. Exch. v. New York & N. E. R. R., 3 Int. Com. Rep. 493, 4 I. C. C. 664 (1890); Re Transportation of Fruit, 10 I. C. C. Rep. 360 (1904); Consolidated Forwarding Co. v. Southern Pac. Ry., 10 I. C. C. Rep. 590 (1905).

Fur Scraps—Myer v. Cleveland, C. & S. L. Ry., 9 I. C. C. Rep. 78 (1901).

Furniture—Potter Mfg. Co. v. Chicago & G. T. Ry., 4 Int. Com. Rep. 223, 5 I. C. C. 514 (1892).

Gable Ornaments—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Galvanized Iron—Business Men's League of St. Louis v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 330 (1903).

Glass—Southern P. & G. Co. v. Lake Erie & W. Ry., 6 I. C. C. Rep. 284 (1894).

Glue, Goatskins—Kindel v. Atchison, T. & S. F. Ry., 9 I. C. C. Rep. 606 (1903).

Grain—Detroit Board of Trade v. Grand T. Ry., 2 Int. Com. Rep. 199, 2 I. C. C. 315 (1888); In re Alleged Excessive Freight Rates, 3 Int. Com. Rep. 93, 4 I. C. C. 48 (1890); Re Fremont E. & M. V. Ry., 6 I. C. C. Rep. 293 (1895); Alleged Unlawful Rates and Practices, 7 I. C. C. Rep. 33 (1897); Paine Bros. v. Lehigh Valley R. R., 7 I. C. C. Rep. 218 (1897); Alleged Unlawful Rates and Practices, 7 I. C. C. Rep. 240 (1897); Suffern v. Indiana D. & W. Ry., 7 I. C. C. Rep. 255 (1897); Chamber of Commerce v. Chicago, M. & S. P. Ry., 7 I. C. C. Rep. 481 (1898); New York Produce Exch. v. Baltimore & O. R. R., 7 I. C. C. Rep. 612 (1898); Listman Mill Co. v. Chicago, M. & S. P. Ry., 8 I. C. C. Rep. 47 (1898); Kemble v. Boston & A. R. R., 8 I. C. C. Rep. 110 (1899); Grain Shippers' Assoc. v. Illinois Cent. R. R., 8 I. C. C. Rep. 158 (1899); Board of Railroad Comrs. v. Atchison, T. & S. F. R. R., 8 I. C. C. Rep. 304 (1899); Pennsylvania Millers' State Assoc. v. Philadelphia & R. R. R., 8 I. C. C. 531 (1900); Diamond Mills v. Boston & Maine R. R., 9 I. C. C. Rep. 311 (1903); In the Matter of Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382 (1903); Mayor and City Council of Wichita v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 534 (1903); Aberdeen Group Commercial Assoc. v. Mobile & O. Ry., 10 I. C. C. Rep. 289 (1904); Cannon Falls Farmers' Elevator Co. v. Chicago G. W. Ry., 10 I. C. C. Rep. 650 (1905).

Grain Products—McMorran v. Grand T. Ry., 2 Int. Com. Rep. 604, 3 I. C. C. Rep. 252 (1889).

Grass Hooks, Grind Stones—Business Men's League v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 330 (1902).

Grille Work—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Hair—Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903).

Hardware—Business Men's League v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 318, 328 (1902).

Hatters' Furs—Myer v. Cleveland, C. & S. Ry., 9 I. C. C. Rep. 78 (1901).

Hay—Behlmer v. Memphis & C. R. R., 6 I. C. C. Rep. 257 (1894); National Hay Assoc. v. Lake Shore & M. S. Ry., 9 I. C. C. Rep. 264 (1902); H. B. Pitts & Son v. Atchison, T. & S. F. R. R., 10 I. C. C. Rep. 691 (1905.

Hemp, Hides—Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903).

Hogs—Squire v. Michigan Cent. R. R., 3 Int. Com. Rep. 515, 4 I. C. C. 611 (1891); Chicago L. S. Exch. v. Chicago G. W. Ry., 10 I. C. C. Rep. 428 (1905).

Hollow Ware—Chattanooga Chamber of Commerce v. Southern Ry., 10 I. C. C. Rep. 118 (1904).

Hominy—F. Schumacher Milling Co. v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 61 (1894).

Honey—Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903).

Horse Cards—Business Men's League v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 330 (1902).

Horses—Barrow v. Yazoo & M. V. R. R., 10 I. C. C. Rep. 333 (1904).

Household Goods—Duncan v. Atchison, T. & S. F. R. R., 6 I. C. C. Rep. 85 (1894).

Ice—Ulric v. Lake Shore & M. S. R. R., 9 I. C. C. Rep. 495 (1903).

Interior Trimmings—Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Iron—Cordele Machine Shop v. Louisville & N. R. R., 6 I. C. C. Rep. 361 (1895); Colorado F. & I. Co. v. Southern Pac. Co., 6 I. C. C. Rep. 488 (1895); Business Men's League v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 318, 327 (1902); Re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382 (1903).

Iron Pipe Fittings—Trade League of Phila. v. Philadelphia, W. & B. R. R., 8 I. C. C. Rep. 368 (1899).

Joists—Central Y. P. Assoc. v. Illinois Cent. R. R., 10 I. C. C. Rep. 519 (1905).

Laths—Michigan Box Co. v. Flint & P. M. R. R., 6 I. C. C. Rep. 335 (1895).

Lemons—Roth v. Texas & P. Ry., 9 I. C. C. Rep. 602 (1903); Consolidated F. Co. v. Southern Pac. Ry., 10 I. C. C. Rep. 509 (1905).

Liquors—Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902).

Live Stock—Cattle Raisers' Assoc. v. Fort Worth & D. C. Ry., 7 I. C. C. Rep. 513 (1898); Sayles v. New York, N. H. & H. R. R., 9 I. C. C. Rep. 492 (1903); Chicago L. S. Exch. v. Chicago G. W. Ry., 10 I. C. C. Rep. 428 (1905).

Lumber—Missouri & I. T. & L. Co. v. Cape Girardeau & S. W. Ry.,

1 Int. Com. Rep. 292, 1 I. C. C. 30 (1887); Farrar v. East Tenn., V. & G. Ry., 1 Int. Com. Rep. 765, 1 I. C. C. 480 (1888); James v. East Tenn., V. & G. Ry., 2 Int. Com. Rep. 609, 3 I. C. C. 225 (1889); Eau Claire Board of Trade v. Chicago, M. & S. P. Ry., 4 Int. Com. Rep. 65, 5 I. C. C. 264 (1892); Michigan Box Co. v. Flint & P. M. R. R., 6 I. C. C. Rep. 335 (1895); Hilton Lumber Co. v. Wilmington & W. R. R., 9 I. C. C. Rep. 17 (1901); National W. L. D. Assoc. v. Norfolk & W. Ry., 9 I. C. C. Rep. 98 (1901); Business Men's League v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 318 (1902); Marten v. Louisville & N. R. R., 9 I. C. C. Rep. 581 (1903); Wichita v. Chicago, R. I. & P. R. R., 9 I. C. C. Rep. 569 (1903); G. C. Pratt Lumber Co. v. Chicago, I. & L. Ry., 10 I. C. C. Rep. 29 (1904); Duluth Shingle Co. v. Duluth, S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905); Mershon S. P. & Co. v. Central R. R., 10 I. C. C. Rep. 456 (1905); Central Yellow Pine Assoc. v. Vicksburg, S. & P. Ry., 10 I. C. C. Rep. 193 (1904); Central Yellow Pine Assoc. v. Illinois C. R. R., 10 I. C. C. Rep. 505 (1905); Tift v. Southern Ry. Co., 10 I. C. C. Rep. 548 (1905).

Machinery—Red Cloud Min. Co. v. Southern Pac. Co., 9 I. C. C. Rep. 216 (1902).

Manufactured Articles—Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 6 I. C. C. Rep. 195 (1894).

Mattress Material—Murphy v. Wabash R. R., 3 Int. Com. Rep. 725, 5 I. C. C. 122 (1891).

Meal—In re Alleged Excessive Freight Rates, 3 Int. Com. Rep. 93, 4 I. C. C. 48 (1890).

Meats—Chicago L. S. Exch. v. Chicago G. W. Ry., 10 I. C. C. Rep. 428 (1905).

Melons—Loud v. South Caroilna Ry., 4 Int. Com. Rep. 205, 5 I. C. C. 529 (1892); Board of Railroad Comrs. v. Florence Ry., 8 I. C. C. Rep. 1 (1898).

Milk—Howell v. New York, L. E. & W. R. R., 2 Int. Com. Rep. 162, 2 I. C. C. 272 (1888); Milk Producers' Protective Assoc. v. Delaware, L. & W. Ry., 7 I. C. C. Rep. 92 (1897); Brockway v. Ulster & D. R. R., 8 I. C. C. Rep. 21 (1898).

Mill Stuff—Milwaukee Chamber of Commerce v. Flint & P. M. R. R., 2 Int. Com. Rep. 393, 2 I. C. C. 553 (1889).

Mohair—Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903).

Molasses—Johnston-Larimer D. G. Co. v. Atchison, T. & S. F. R. R., 6 I. C. C. Rep. 568 (1896); Calloway v. Louisville & N. R. R., 7 I. C. C. Rep. 431 (1897); Phillips v. Louisville & N. R. R., 8 I. C. C. Rep. 93 (1898); Danville v. Southern Ry., 8 I. C. C. Rep. 409 (1900).

Mules—Barrow v. Yazoo & M. V. R. R., 10 I. C. C. Rep. 333 (1904).

Oatmeal—F. Schumacher Milling Co. v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 61 (1894).

Oats—In re Alleged Excessive Freight Rates, 3 Int. Com. Rep. 93, 4 I. C. C. 48 (1890); Paine v. Lehigh Valley R. R., 7 I. C. C. Rep. 218 (1897); National Hay Assoc. v. Lake Shore & M. S. Ry., 9 I. C. C. Rep. 264 (1902); Aberdeen Group Commercial Assoc. v. Mobile & O. Ry., 10 I. C. C. Rep. 289 (1904).

Oil—Nicolai v. Pennsylvania R. R., 2 Int. Com. Rep. 78, 2 I. C. C. 131 (1888); In re Tank & Barrel Rates, 2 Int. Com. Rep. 245, 2 I. C. C. 365 (1888); Rice v. Western N. Y. & P. R. R., 2 Int. Com. Rep. 298, 2 I. C. C. 389 (1889); Independent Refiners' Assoc. v. Western N. Y. & P. R. R., 4 Int. Com. Rep. 162, 5 I. C. C. 415 (1892); Independent Refiners' Assoc. v. Pennsylvania R. R., 6 I. C. C. Rep. 52 (1894); Independent Refiners' Assoc. v. Western N. Y. & P. R. R., 6 I. C. C. Rep. 378 (1895).

Onions—Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895).

Open-end Envelopes—Wolf Bros. v. Allegheny Valley Ry., 7 I. C. C. Rep. 40 (1897).

Oranges—Railroad Comrs. v. Savannah, F. & W. Ry., 3 Int. Com. Rep. 688, 5 I. C. C. 13 (1891); Consolidated Forwarding Co. v. Southern Pac. Co., 9 I. C. C. Rep. 182 (1902), 10 I. C. C. Rep. 590 (1905).

Packing-house Products—Squire v. Michigan Cent. R. R., 3 Int. Com. Rep. 515, 4 I. C. C. 611 (1891); In re Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382 (1903); Chicago L. S. Exch. v. Chicago G. W. Ry., 10 I. C. C. Rep. 428 (1905).

Panel Jambs, Wainscoting and Ceiling, Pantry Fittings—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1904).

Paper Wrapping—Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902).

Peaches—Georgia Peach Growers' Assoc. v. Atlantic Coast Line Ry., 10 I. C. C. Rep. 255 (1904); Re Transportation of Fruit, 10 I. C. C. Rep. 360 (1904).

Pearl Barley—F. Schumacher Milling Co. v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 61 (1894).

Pease—Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1894).

Phosphate Rock—Troy Board of Trade v. Alabama M. Ry., 6 I. C. C. Rep. 1 (1894).

Pig Iron—Poughkeepsie Iron Co. v. New York C. & H. R. R. R., 3 Int. Com. Rep. 248, 4 I. C. C. 195 (1890); Cordele Machine Shop v. Louisville & N. R. R., 6 I. C. C. Rep. 361 (1895).

Pilasters—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1904).

Pineapples—Roth v. Texas & P. Ry., 9 I. C. C. Rep. 602 (1903).

Porch Columns, Newels and Railings, Portiere Work—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Potatoes—Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895); Rea v. Mobile & O. Ry., 7 I. C. C. Rep. 43 (1897); Freeman v. Atchison, T. & S. F. R. R., 7 I. C. C. Rep. 202 (1897); Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902); National Hay Assoc. v. Lake Shore & M. S. Ry., 9 I. C. C. Rep. 264 (1902).

Poultry—Re Alleged Violations of Act, 8 I. C. C. Rep. 290 (1899).

Provisions—New York Produce Exch. v. Baltimore & O. R. R., 7 I. C. C. Rep. 612 (1898).

Radiators—Business Men's League v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 318 (1902).

Rice—Johnston-Larimer D. G. Co. v. Atchison, T. & S. F. R. R., 6 I. C. C. Rep. 568 (1896); Danville v. Southern Ry., 8 I. C. C. Rep. 409 (1900); Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903).

Rolled Oats—F. Schumacher Milling Co. v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 61 (1894).

Roofing Slag—Warren-Ehret Co. v. Central R. R., 8 I. C. C. Rep. 598 (1900).

Rope—Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902).

Rosin—Savannah Bureau of Freight & Transp. v. Louisville & N. R. R., 8 I. C. C. Rep. 377 (1899).

Rye—National Hay Assoc. v. Lake Shore & M. S. Ry., 9 I. C. C. Rep. 264 (1902); Canon Falls F. E. Co. v. Chicago G. W. Ry., 10 I. C. C. Rep. 650 (1905).

Salt—Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902); Re Transportation of Salt from Hutchinson, 10 I. C. C. Rep. 1 (1904); Re Transportation of Salt, 10 I. C. C. Rep. 148 (1904).

Sand—Castle v. Baltimore & O. Ry., 8 I. C. C. Rep. 333 (1899).

Sash—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

School Slates—Chattanooga Chamber of Commerce v. Southern Ry., 10 I. C. C. Rep. 118 (1904).

Screen Frames, Scroll Work—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Sealskins, Sea Shells, Sheepskins—Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903).

Sheet Iron—Business Men's League v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 330 (1902).

Shelves—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Shingles—James v. Canadian Pac. Ry., 4 Int. Com. Rep. 274, 5 I. C. C. 612 (1893); Michigan Box Co. v. Flint & P. M. R. R., 6 I. C. C. Rep. 335

(1895); Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Shutters—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Slates—Chattanooga Chamber of Commerce v. Southern Ry., 10 I. C. C. Rep. 118 (1904).

Snapped Corn—H. B. Pitts & Son v. St. Louis & S. F. Ry., 10 I. C. C. Rep. 684 (1905).

Soap—Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902); Proctor & Gamble Co. v. Cincinnati H. & D. R. R., 9 I. C. C. Rep. 440 (1903).

Soil Pipe—Business Men's League v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 318 (1902).

Spindles—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Spring-bed Material—Murphy v. Wabash R. R., 3 Int. Com. Rep. 725, 5 I. C. C. 122 (1891).

Squash—Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895).

Stair Work—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Steel—Colorado F. & I. Co. v. Southern Pac. Co., 6 I. C. C. Rep. 488 (1895).

Stove Fronts—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Straw—National Hay Assoc. v. Lake Shore & M. S. R. R., 9 I. C. C. Rep. 264 (1902).

Strawberries—Perry v. Florida C. & P. R. R., 3 Int. Com. Rep. 740, 5 I. C. C. 97 (1891); Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895).

Sugar—Lehmann v. Southern Pac. Co., 3 Int. Com. Rep. 80, 4 I. C. C. 1 (1890); Lehmann v. Texas & P. Ry., 3 Int. Com. Rep. 706, 5 I. C. C. 44 (1891); Johnston-Larimer D. G. Co. v. Atchison, T. & S. F. R. R., 6 I. C. C. Rep. 568 (1896); Calloway v. Louisville & N. R. R., 7 I. C. C. Rep. 431 (1897); Phillips, Bailey & Co. v. Louisville & N. R. R., 8 I. C. C. Rep. 93 (1898); Savannah Bureau of Freight & Transp. v. Louisville & N. R. R., 8 I. C. C. Rep. 377 (1899); Danville v. Southern Ry., 8 I. C. C. Rep. 409 (1900); Gustin v. Burlington & M. R. R., 8 I. C. C. Rep. 481 (1900); Kindel v. Atchison, T. & S. F. R. R., 8 I. C. C. Rep. 608 (1900); Tifton v. Louisville & N. R. R., 9 I. C. C. Rep. 160 (1902); Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902); Wichita v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 507 (1903); Lehman-Higginson Grocery Co. v. Atchison, T. & S. F. R. R., 10 I. C. C. Rep. 460 (1905); Blackman v. Southern Ry., 10 I. C. C. Rep. 352 (1904.

Tobacco—Danville v. Southern Ry., 8 I. C. C. Rep. 409 (1900).

Tomatoes—Rea v. Mobile & O. Ry., 7 I. C. C. Rep. 43 (1897).

Turnips—Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895).

Turpentine—Savannah Bureau of Freight & Transp. v. Louisville & N. R. R., 8 I. C. C. Rep. 377 (1899).

Vanilla Beans—Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903).

Vegetables—Delaware State Grange v. New York, P. & N. R. R., 3 Int. Com. Rep. 554, 4 I. C. C. 588 (1891); Re Unlawful Charges for Transportation of Vegetables, 8 I. C. C. Rep. 585 (1900); Truck Farmers' Assoc. v. Northeastern Ry., 6 I. C. C. Rep. 295 (1895).

Wagons—Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902).

Wainscoting—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Whalebone and Whale Oil Foots—Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903).

Wheat—Evans v. Oregon Ry. & N. Co., 1 Int. Com. Rep. 641, 1 I. C. C. 325 (1887); Milwaukee Chamber of Commerce v. Flint B. & P. M. R. R., 2 Int. Com. Rep. 393, 2 I. C. C. 553 (1889); In re Alleged Excessive Freight Rates, 3 Int. Com. Rep. 93, 4 I. C. C. 48 (1890); Buchanan v. Northern Pac. R. R., 3 Int. Com. Rep. 655, 5 I. C. C. 7 (1891); F. Schumacher Milling Co. v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 61 (1894); Newland v. Northern P. R. R., 6 I. C. C Rep. 131 (1894); Evans v. Union P. Ry., 6 I. C. C. Rep. 520 (1896); Board of Railroad Comrs. v. Cincinnati, N. O. & T. P. Ry., 7 I. C. C. Rep. 380 (1897); Chamber of Commerce v. Chicago, M. & St. P. Ry., 7 I. C. C. Rep. 481 (1898); Grain Shippers' Assoc. v. Illinois Cent. R. R., 8 I. C. C. Rep. 158 (1899); Re Export and Domestic Rates on Grain, 8 I C. C. Rep. 214 (1899); Board of R. Comrs. v. Atchison, T. & S. F. R. R., 8 I. C. C. Rep. 304 (1899); National Hay Assoc. v. Lake Shore & Michigan S. Ry., 9 I. C. C. Rep. 264 (1902); Wichita v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 558 (1903); Wichita v. Missouri Pac. Ry., 10 I. C. C. Rep. 35 (1904); Aberdeen Group Commercial Assoc. v. Mobile & O. Ry., 10 I. C. C. Rep. 289 (1904); Cannon Falls Farmers' Elevator Co. v. Chicago G. W. Ry., 10 I. C. C. Rep. 650 (1905).

Window Frames and Screens—Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905).

Window Shades—6 I. C. C. Rep. 148 (1894), 6 I. C. C. Rep. 548 (1896).

Wine, Wire Fence, Woodenware—Shippers' Union of Phoenix v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 250 (1902).

Wool—Kindel v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 606 (1903).

Zinc Sheets, Zinc Slab—Business Men's League v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 323 (1902).

TOPIC E—REASONABLE FACILITIES.

[The common law situation is discussed in Chapters VII, IX, XX, XXIII.]

§ 935. Not required by original act.

The original interstate commerce act did not require or give the Commission power to require that carriers should furnish reasonable facilities; though it did forbid any discrimination in furnishing facilities. The common law required the furnishing of such facilities; but since the act was silent, the Commission could not require a carrier to furnish cars. Scofield v. Lake Shore & M. S. Ry., 2 Int. Com. Rep. 67, 2 I. C. C. 90 (1888); Rice v. Cincinnati, W. & B. R. R., 3 Int. Com. Rep. 841, 5 I. C. C. 193 (1891). Nor can it require a railroad to furnish refrigerator cars for the carriage of fruit. Re Transportation & Refrigeration of Fruit, 10 I. C. C. Rep. 360 (1904). So it cannot order a railroad to deliver carload freight in bulk to a connecting road. Railroad Comrs. v. Louisville & N. R. R., 10 I. C. C. Rep. 173 (1904). Nor is a railroad under the act obliged to allow a steamboat access to its wharf. Ilwaco Ry. & Nav. Co. v. Oregon S. L. & U. N. Ry., 57 Fed. 673, 6 C. C. A. 495, 5 Int. Com. Rep. 627 (1895).

§ 936. Switching privileges.

In the same way under the original act a railroad was not bound to provide and maintain a spur track to the premises of a shipper. Mt. Vernon Milling Co. v. Chicago, M. & S. P. Ry., 7 I. C. C. Rep. 194 (1897); Red Rock Fuel Co. v. Baltimore & O. R. R., 11 I. C. C. Rep. 438 (1905). The duty of providing switching privileges was placed upon railroads in England in 1904 (*ante*, § 874), and now is imposed in the United States by the provision of the act of 1906 given above.

CHAPTER XXIX.

DISCRIMINATIONS BETWEEN PERSONS.

§ 941. Provisions of the statute.
942. Amendments of 1906.

TOPIC A—UNDUE OR UNREASONABLE PREFERENCE OR ADVANTAGE.

§ 943. What discrimination is forbidden.
944. What preference is undue and unreasonable.
945. Device for concealing preference unavailing.
946. Preference in certain services permissible.
947. Effect of illegality on contract of carriage.

TOPIC B—LIKE AND CONTEMPORANEOUS SERVICE.

§ 948. Difference in time or place.
949. Difference in nature of service.

TOPIC C — SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS.

§ 950. What circumstances can be considered.
951. Occupation of passenger or shipper.
952. Difference in amount of shipment.
953. Discrimination in use of cars.
954. Discrimination between commodities.

TOPIC D—SPECIAL RATE OR REBATE.

§ 955. What amounts to a rebate.
956. Allowance for cars or facilities furnished by the shipper.
957. Division of rate with industrial railway.
958. Sale and delivery of commodities by a railroad.

TOPIC E—EXCEPTIONS.

§ 959. Statutory exceptions not exclusive.
960. Carriage for the government.
961. Ministers of religion.
962. Officers and employees.
963. Mileage, excursion and commutation tickets.

§ 941. **Provisions of the statute.**

Equal charges for like and contemporaneous service.—Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. [Interstate Commerce Act, section 2.]

Discrimination.—Sec. 3. That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Interchange of traffic.—Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. [Interstate Commerce Act, section 3.]

Preference to United States in war time.—That in time of war or threatened war, preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. [Act of June 29, 1906, section 2.]

Exceptions.—That nothing in this Act shall prevent the carriage, storage, or handling of property, free or at reduced rates

For the United States, State, or municipal governments,

Or for charitable purposes,

Or to or from fairs or expositions for exhibition thereat,

Or the free carriage of destitute and homeless persons transported by charitable societies,

And the necessary agents employed in such transportation,

Or the issuance of mileage, excursion, or commutation passenger tickets;

Nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion,

Or to municipal governments for the transportation of indigent persons,

Or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes.

Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees,

Or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees;

And nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies:

Provided, that no pending litigation shall in any way be affected by this act. [Interstate Commerce Act, section 22, as amended by section 9, Act of March 2, 1889.]

Free passes: exceptions.—No carriers subject to the provisions of this Act shall after Jan. 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge, and boards of managers of such Homes; to necessary caretakers of live stock, poultry and fruit; to employees on sleeping cars, express-cars, and to linemen of telegraph and telephone companies; to railway mail service employees, post-office inspectors, customs inspectors, and immigration inspectors, to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons. Provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families, nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitations.

Penalty.—Any common carrier violating this provision shall be deemed guilty of a misdemeanor and shall for each offense, on conviction, pay to the United States a penalty of not less

than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof. [Interstate Commerce Act, as amended by Act of June 29, 1906, section 1.]

§ 942. Amendments of 1906.

The language of sections 2 and 3 of the original act was unchanged by the Act of 1906. The effect of the latter act on section 22 of the original act, as amended in 1889, is more doubtful. The Act of 1906 does not purport to amend section 22; the free-pass provision is in form an amendment to section 1. It can affect section 22, therefore, only as a result of the repealing clause (section 10 of the Act of 1906), which repeals all laws or parts of laws "in conflict with the provisions of this act." The first part of section 22, which refers to transportation of property is certainly not affected by the new provisions. The clause permitting the issuance of mileage, excursion, or commutation tickets is almost as clearly unrepealed, since the new provision applies only to free carriage. The provisions of section 22 as to the free carriage of persons appear all to have been included in the new act. On the whole, therefore, none of the provisions of the new act appear to be in necessary conflict with any part of section 22, and we may therefore conclude that no part of that section has been repealed. All three of these sections of the old act are therefore printed as in force.

The new provisions are two:

1. The preference to the United States in time of war.
2. The new anti-free-pass provision, with its penalties.

TOPIC A—UNDUE OR UNREASONABLE PREFERENCE OR ADVANTAGE.

[This topic is fully discussed, *ante*, Chapters XXI-XXIII.]

§ 943. What discrimination is forbidden.

The discrimination forbidden by the act is not confined to any one form of unfair dealing. It need not be accomplished by any particular device;

and on the other hand no device will prevent an unreasonable preference from being unlawful under the act. Scofield v. Lake Shore & M. S. R. R., 2 Int. Com. Rep. 67, 2 I. C. C. 90 (1888). It includes preference in rates: United States v. Tozer, 37 Fed. 635, 2 Int. Com. Rep. 597, on appeal 39 Fed. 904 (1889); in classification: Bates v. Pennsylvania R. R., 2 Int. Com. Rep. 715, 3 I. C. C. 435 (1889); National Hay Assoc. v. Lake Shore & M. S. R. R., 9 I. C. C. Rep. 264 (1902); and in the furnishing of facilities: Re Morris, 2 Int. Com. Rep. 617 (1889). The discrimination must be actual, not merely contemplated, as by offering a discriminative rate which is not accepted: Griffee v. Burlington & M. R. Ry., 2 Int. Com. Rep. 194 (1889); Richmond Elevator Co. v. Pere Marquette R. R., 10 I. C. C. Rep. 629 (1905); Lehigh Valley R. R. v. Ramey, 112 Fed. 487 (1902); or by giving a concession to a shipper which is not shown to have been refused to any other shipper. United States v. Hanley, 71 Fed. 672 (1896). The act applies only to the future; it does not embrace cases which occurred before the act was passed. Ottinger v. Southern Pac. R. R., 1 Int. Com. Rep. 607, 1 I. C. C. 144 (1887).

§ 944. What preference is undue and unreasonable.

In a passage often quoted Judge Jackson in Interstate Commerce Commission v. Baltimore & O. R. R., 43 Fed. 37 (1890), said: "These words necessarily involve the idea or element of comparison of one service or traffic with another similarly situated and circumstanced, and require that, to be undue and unreasonable, the preference or prejudice must relate and have reference to competing parties, producing between them unfairness and an unjust inequality in the rates charged them, respectively, for contemporaneous service under substantially the same circumstances and conditions. In determining the question whether rates give an undue preference or impose an undue prejudice or disadvantage, consideration must be had to the relation which the persons or traffic affected bear to each other and to the carrier. When and so long as their relations are similar or 'substantially' so, the carrier is prohibited from dealing differently with them in the matter of charges for a like and contemporaneous service. . . . The English cases referred to above, and others that might be cited, establish the rule that, in passing upon the question of undue or unreasonable preference or advantage, it is not only legitimate, but proper, to take into consideration besides the mere difference in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise." This language was approved by the Supreme Court on appeal: Interstate Commerce Commission v. Baltimore & O. R. R., 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844, 4 Int. Com.

Rep. 92 (1892), and has since been universally followed. See Interstate Commerce Commission v. Chicago G. W. Ry., 141 Fed. 1003 (1905).

Undue preference involves comparison between the treatment given to shippers, and upon comparison a finding that one is unfairly treated. In short, any unreasonable inequality of treatment of passengers or shippers is a violation of the law. Daniels v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 458 (1895); Page v. Delaware, L. & W. R. R., 6 I. C. C. Rep. 548 (1896); Castle v. Baltimore & O. R. R., 8 I. C. C. Rep. 333 (1899). So it is an unjust discrimination to remove a colored passenger holding a first class ticket from a first class car, to a second class car, less clean and comfortable. Passengers paying the same fare upon the same railroad train, whether white or colored, are entitled to equality of transportation in respect to the character of the cars in which they travel and the comforts and conveniences supplied. The separation of white and colored passengers paying the same fare is not unlawful, if cars and accommodations equal in all respects are furnished to both and the same care and protection of passengers observed; but by requiring one who had paid a first class fare, to ride in a half car set apart for colored passengers, with accommodations and comforts inferior to the car for white passengers in the same train who paid the same fare, and without the protection against annoyances furnished to white passengers, a railroad subjected him to undue and unreasonable prejudice and disadvantage, in violation of the act. Heard v. Georgia R. R., 1 Int. Com. Rep. 719, 1 I. C. C. 428 (1888); Councill v. Western & A. R. R., 1 Int. Com. Rep. 638, 1 I. C. C. 339 (1887); Heard v. Georgia R. R., 2 Int. Com. Rep. 508, 3 I. C. C. 111 (1889).

So where a carrier refused to permit a sidetrack connection with its road to one coal mine, while permitting it to another under similar circumstances, it was held to be a violation of the act. Not every person or company desiring to develop a coal mine along or near defendant's road is entitled to demand a sidetrack connection merely because connections have previously been made with other mines. There must be such similarity of situation and feasibility of connection as will permit practical adherence to reasonable operating conditions by the carrier. But where physical conditions pertaining to the proposed connection are at least as favorable to the carrier as those pertaining to the other connections the applicant is entitled to his connection. Red Rock Fuel Co. v. Baltimore & O. R. R., 11 I. C. C. Rep. 438 (1905).

§ 945. Device for concealing preference unavailing.

As has been seen, no device to conceal the preference can operate to evade the statute. Thus underbilling a device by which a shipper pays for the transportation of a less quantity of freight than is actually carried, and thereby obtains a reduced rate upon the gross shipment, is forbidden

by the act. In re Underbilling, 1 Int. Com. Rep. 813, 1 I. C. C. 633 (1888). So the failure to furnish cars rateably in time of shortage is an unreasonable preference under the act. Richmond Elevator Co. v. Pere Marquette R. R., 10 I. C. C. Rep. 629 (1905). So complainant was unjustly discriminated against by defendant's refusal to provide cars for the shipment of cross ties, while it did furnish cars to other persons for the interstate shipment of lumber, stone, and many other freight articles, and also supplied cars for the shipment of cross ties destined almost entirely for its own use. Paxton Tie Co. v. Detroit S. Ry., 10 I. C. C. Rep. 422 (1905). So the payment of an unreasonable rent for the use of cars furnished by shippers creates an unreasonable preference. Rice v. Cincinnati, W. & B. R. R., 3 Int. Com. Rep. 841, 5 I. C. C. 193 (1891). When actual weights cannot be ascertained without needless inconvenience there is no serious objection to the use of estimated or constructive weights, provided the method of estimation works no inequality in its practical application to competing modes of conveyance; but this rule, too, in circumstances where it works injustice would be illegal. *Ibid.*

§ 946. Preference in certain services permissible.

In matters outside the scope of its public business the carrier is at liberty to discriminate at pleasure; such cases are not covered by the act. So in providing cars for its traffic it may lease as well as buy them, and if it leases them, it may deal exclusively with one car company and refuse to deal with other companies. Re Transportation of Fruit, 10 I. C. C. Rep. 360 (1905); Consolidated Forwarding Co. v. Southern P. Co., 9 I. C. C. Rep. 182 (1902); Burton Stock-Car Co. v. Chicago, B. & Q. R. R., 1 Int. Com. Rep. 329, 1 I. C. C. 132 (1887). So a railway company practices no discrimination within the Interstate Commerce Act by selling passenger tickets at full fare to a land company which sells them at half rates to guests of its hotel, persons residing upon land sold or transferred by it, and others, but refusing to sell them at half rates to a person living in the same locality upon ground not acquired from it, although the two corporations are under substantially the same ownership and control, where their community of interests is not made a device for enabling the railway company to evade its legal obligations. Willson v. Rock Creek R. R., 7 I. C. C. Rep. 83 (1897).

So a railroad may make and carry out an exclusive contract with a stock-yards company for the exclusive delivery to that company of live stock in a city, and no other stock-yards company or carrier can complain so long as all shippers and consignees have equal facilities there. Central Stock-Yards Co. v. Louisville & N. R. R., 118 Fed. 113, 55 C. C. A. 63 (1902). And this is true although in carrying out such contract it refuses to deliver to another railroad company, for delivery to a competing stock yards, live stock consigned to such competing stock yards. Railroad Com-

mission of Kentucky v. Louisville & N. R. R., 10 I. C. C. Rep. 173 (1904). So the exercise by a railway company of the right to prepayment, or to retain a lien upon the goods until payment is made, or to hold the consignee responsible in case of delivery before payment, or the waiver of some of such rights at different times, cannot be construed to be a discrimination. Little Rock & M. R. Co. v. St. Louis & S. W. Ry., 63 Fed. 775, 11 C. C. A. 417, B. & W. 277 (1894).

§ 947. Effect of illegality on contract of carriage.

The effect of a violation of the act is to make the contract of carriage, including the rate named therein, invalid. The carrier therefore cannot be sued for breach of an executory term of the contract. Interstate Commerce Commission v. Chesapeake & O. Ry., 128 Fed. 59 (1904); Red Cloud Mining Co. v. Southern Pac. Co., 9 I. C. C. Rep. 216 (1902). And the contract rate being invalid the carrier may collect the schedule rate. Texas & P. Ry. v. Mudd, 26 Sup. Ct. 628 (1906), reversing 98 Tex. 352, 83 S. W. 800; Duncan v. Atchison, T. & S. F. R. R., 4 Int. Com. Rep. 385 (1893); St. Louis & S. F. R. R. v. Ostrander (Ark.), 52 S. W. 435 (1899); Kizer v. Texarkana & F. S. Ry. (Ark.), 50 S. W. 871 (1899); Raleigh & G. R. R. v. Swanson (Ga.), 28 S. E. 601 (1897); Bullard v. Northern Pac. R. R. (Mont.), 25 Pac. 120, 3 Int. Com. Rep. 536 (1890). The burden is on the party desiring to avoid the contract to show that it violates the act. Southern Pac. Co. v. Redding (Tex. Civ. App.), 43 S. W. 1061 (1897).

This principle however applies only to a claim which must be based on the illegal contract. The granting of a rebate contrary to the provision of the interstate commerce law does not render the bill of lading void, so that no action can be maintained against the carrier for loss of the goods by negligence. Merchants' C. P. & S. Co. v. Insurance Co. of North America, 151 U. S. 368, 38 L. Ed. 195, 14 Sup. Ct. 367 (1894).

TOPIC B—LIKE AND CONTEMPORANEOUS SERVICE.

[See Chapters XXI and XXII for discussion of principles.]

§ 948. Difference in time or place.

In order to be obnoxious to the act on the ground of discrimination, the services of the carrier with respect to which discrimination is alleged must be performed at practically the same time and place. If the two services are performed at substantially different times they cannot be compared. Thus a carrier is not compelled to give special excursion rates to one political convention because it has given them to a similar convention of another political party on another date. Cator v. Southern P. Co., 4 Int. Com. Rep. 397, 6 I. C. C. 113 (1893). The same thing is true if the services compared are performed in different parts of the country. Allen v.

Oregon Ry. & Nav. Co., 98 Fed. 16 (1899); Central Yellow Pine Assoc. v. Illinois Cent. R. R., 10 I. C. C. Rep. 505 (1905); Parks v. Cincinnati & M. V. R. R., 10 I. C. C. Rep. 47 (1904); or in different directions. McLoon v. Boston & M. R. R., 9 I. C. C. Rep. 642 (1903); Hewins v. New York, N. H. & H. R. R., 10 I. C. C. Rep. 221 (1904).

§ 949. Difference in nature of service.

There is no illegal discrimination unless the services compared are substantially the same. Thus a reasonable classification of commodities or passengers according to the nature of the goods or the accommodations furnished does not result in discrimination. Lavery v. New York C. & H. R. R. R., 2 Int. Com. Rep. 210, 2 I. C. C. 338 (1888); New York Board of Trade and Transp. v. Pennsylvania R. R., 3 Int. Com. Rep. 417, 4 I. C. C. 447 (1890); Brownell v. Columbus & C. M. R. R., 4 Int. Com. Rep. 285, 5 I. C. C. 638 (1893). Nor can the carriage of products of entirely different kinds be compared. Rice v. Cincinnati, W. & B. R. R., 3 Int. Com. Rep. 841, 5 I. C. C. 193 (1891); Pennsylvania Millers' State Assoc. v. Philadelphia & R. R. R., 8 I. C. C. Rep. 531 (1900). Nor can charges for terminal or other incidental services of entirely different kinds be compared; such as storage charges at warehouses and in stations. Blackman v. Southern Ry., 10 I. C. C. Rep. 352 (1904); delivery of goods on spur tracks and by drays, Hezel Milling Co. v. St. Louis, A. & T. H. R. R., 3 Int. Com. Rep. 701, 5 I. C. C. 57 (1891); carriage through cities where bus transfer is and is not furnished. Behrend v. Washington S. Ry., 9 I. C. C. Rep. 637 (1903).

But a difference in charge for carrying oil in tank cars and in barrels, where carriage in tank cars is not open to shippers impartially, is an illegal discrimination, since the service to the shipper is the same. Independent Refiners' Assoc. v. Western N. Y. & P. R. R., 4 Int. Com. Rep. 162, 5 I. C. C. 415 (1892).

TOPIC C — SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS.

[See discussion of the principles requiring equal service in Chapters VII, VIII, XXII, XXIII.]

§ 950. What circumstances can be considered.

A discrimination against a shipper is not justified because he has refused in the past to pay excessive charges: Phelps v. Texas & P. Ry., 4 Int. Com. Rep. 363, 6 I. C. C. 36 (1894), or because the goods are eventually destined to a point beyond the original destination. Northwestern I. G. & S. S. Assoc. v. Chicago & N. W. Ry., 2 Int. Com. Rep. 431, 2 I. C. C. 604 (1889); Hope Cotton Oil Co. v. Texas & P. Ry., 10 I. C. C. Rep.

696 (1905). Or because they came from a certain place. Bigbee & W. R. P. Co. v. Mobile & O. Ry., 60 Fed. 545 (1893). So the magnitude of a shipper's enterprise, the number of persons for whom it produces employment and support, the developing results of its business upon the natural resources of the State, the impracticability of moving its plant to other localities, and the fact that it produces material largely used on railroads for construction or repair, do not entitle it to different consideration in respect to rates than individuals and small concerns should receive. Colorado Fuel & I. Co. v. Southern P. Co., 6 I. C. C. Rep. 488 (1895). Nor will the private interest of the carrier justify discrimination. Thus the high relative classification of railroad ties, under the desire to keep them upon its own line and keep the price low for its own use, is unreasonable discrimination. Reynolds v. Western N. Y. & P. R. R., 1 Int. Com. Rep. 685, 1 I. C. C. 393 (1887). So an assurance by a carrier, that if one will locate in business on its line his property shall be taken for transportation as belonging to a specified class, cannot bind the carrier so as to compel a classification accordingly. A right to special rates cannot be made out in this way. Hurlburt v. Lake Shore & M. S. R. R., 2 Int. Com. Rep. 81, 2 I. C. C. 122 (1888). A higher charge when coal is loaded from wagon instead of from tipple, when the difference is not justified by any difference in cost to the carrier, is unlawful. Glade Coal Co. v. Baltimore & O. R. R., 10 I. C. C. Rep. 226 (1904); Thompson v. Pennsylvania R. R., 10 I. C. C. Rep. 640 (1905).

On the other hand, circumstances which really cause trouble or expense to the carrier may be considered. Thus where party-rate tickets are ordinarily closely limited in time, and are paid for in cash in advance, while those furnished to the government are not so limited, are furnished on a requisition, and are only paid for after indefinite delay in the auditing and allowance of the claims by the War and Treasury Departments, the conditions and circumstances under which the service is rendered are essentially different, and justify the making of different rates. United States v. Chicago & N. W. Ry., 127 Fed. 785, 62 C. C. A. 465 (1904).

Other differences will render the services unlike. So where a passenger fails to buy a ticket, compelling him to pay excess fare is not an unlawful discrimination against him. Sidman v. Richmond & D. R. R., 2 Int. Com. Rep. 766, 3 I. C. C. 512 (1890).

§ 951. Occupation of passenger or shipper.

A difference in rate cannot be justified by a difference in occupation of the passenger or shipper. Thus a lower rate of fare will not be justified to land explorers and settlers. Smith v. Northern Pac. R. R., 1 Int. Com. Rep. 611, 1 I. C. C. 208 (1887); or to emigrants, Elvey v. Illinois Cent. R. R., 2 Int. Com. Rep. 804, 3 I. C. C. 652 (1890); or to commercial travellers, Larrison v. Chicago & G. T. Ry., 1 Int. Com. Rep. 369 (1887); As-

sociated Wholesale Grocers v. Missouri Pac. Ry., 1 Int. Com. Rep. 393, 1 I. C. C. Rep. 156 (1887); though the carrier's future business would be thereby stimulated. Nor can a lower rate for the carriage of goods be offered to manufacturers. Re Louisville & N. R. R., 4 Int. Com. Rep. 157, 5 I. C. C. 466 (1892); or to emigrants: Duncan v. Atchison, T. & S. F. R. R., 4 Int. Com. Rep. 385, 6 I. C. C. 85 (1894). Nor will a discrimination against a shipper of coal be justified because he was a druggist, and not in the coal business. Thompson v. Pennsylvania R. R., 10 I. C. C. Rep. 640 (1905).

§ 952. Difference in amount of shipment.

No dissimilarity of conditions which can justify a difference in rate is created by the total amount of shipments during a certain time, as so much in a year. Providence Coal Co. v. Providence & W. R. R., 1 Int. Com. Rep. 363, 1 I. C. C. 107 (1887); United States v. Tozer, 39 Fed. 369, 2 Int. Com. Rep. 597 (1889); Kinsley v. Buffalo, N. Y. & P. Ry., 3 Int. Com. Rep. 318 (1890).

A shipment of a large amount at one time may, however, justify a lower rate if it results in economy of operation, as for instance a carload shipment, provided the difference is reasonable in view of the saving effected. Thurber v. New York C. & H. R. R. R., 2 Int. Com. Rep. 742, 3 I. C. C. 473 (1890); Buckeye Buggy Co. v. Cleveland, C., C. & S. L. R. R., 9 I. C. C. Rep. 620 (1903). So a rule making a minimum charge of one hundred pounds on shipments of less weight is justifiable. Wrigley v. Cleveland, C., C. & St. L. R. R., 10 I. C. C. Rep. 412 (1905). If the amount of the shipment will not lead to a saving in expense to the carrier, no difference can be made on account of it. So where the shipment is in cargo or trainload quantities it cannot get less than carload rates. Paine v. Lehigh Valley R. R., 7 I. C. C. Rep. 218 (1897).

§ 953. Discrimination in use of cars.

If there is a shortage of cars due to unusual press of business, the carrier must supply his cars rateably as far as they go; and if he makes a reasonable distribution no one can complain of discrimination. United States v. West Virginia N. R. R., 125 Fed. 252 (1903); S. S. Daish & Sons v. Cleveland, A. & C. Ry., 9 I. C. C. Rep. 513 (1903); Riddle v. Baltimore & O. R. R., 1 Int. Com. Rep. 778, 1 I. C. C. 372 (1888). Regular customers are not entitled to preference over occasional ones under such circumstances. Riddle v. New York, L. E. & W. Ry., 1 Int. Com. Rep. 787, 1 I. C. C. 594 (1887). At such times a carrier may refuse to allow cars to be sent off its line to distant points. Riddle v. Pittsburgh & L. E. R. R., 1 Int. Com. Rep. 688, 1 I. C. C. 374 (1887). And a temporary rule of the carrier limiting its coal cars to mines having track connection with its

road, thereby confining its comparatively few available cars to mines generally in operation, where quick loading could be accomplished, and declining to permit its sidings or switches to be further congested by loading coal from wagons, was calculated to hasten, rather than retard, the movement of coal for public use, and was not unreasonable or unjust. Thompson v. Pennsylvania R. R., 10 I. C. C. Rep. 640 (1905).

Carriers may, if they choose, hire cars from other persons, even from shippers. Scofield v. Lake Shore & M. S. R. R., 2 Int. Com. Rep. 67, 2 I. C. C. 90 (1888). But in that case the rate charged for carriage to other shippers must be the same, excepting the reasonable rent of the car. *Ibid.* If the carrier fails to furnish proper cars for transportation, as for instance tank cars for transporting oil, it will be unlawful discrimnation to charge shippers who cannot get tank cars more than it charges shippers who own and furnish tank cars. Rice v. Louisville & N. R. R., 1 Int. Com. Rep. 722 (1888); Rice v. Western N. Y. & P. R. R., 3 Int. Com. Rep. 162, 4 I. C. C. 131 (1890); Independent Refiners' Assoc. v. Pennsylvania R. R., 6 I. C. C. Rep. 52 (1894); Independent Refiners' Assoc. v. Western N. Y. & P. R. R., 6 I. C. C. Rep. 378 (1895).

Where certain cars are so arranged that they can be used on the return trip for coal, while other cars cannot be so used, a lower rate is justifiable upon goods carried in cars of the former sort, provided they are at the service of shippers. United States v. Delaware, L. & W. R. R., 40 Fed. 101 (1889). So the expense of hauling the Burton cars in one direction unloaded, since by their construction they are not suited to carry general freight, and the fact that a large percentage of ordinary cattle cars are back loaded upon long hauls of western roads, are considerations which justify difference in charge against shippers who prefer to hire improved stock cars. Burton Stock Car Co. v. Chicago, Burlington & Quincy R. R., 1 Int. Com. Rep. 329, 1 I. C. C. 132 (1887).

§ 954. Discrimination between commodities.

In determining whether there is a discrimination between different but similar articles, all the factors which go to affect a reasonable rate are to be considered, such as character and quality of the commodity, cost of production, extent and nature of the competition in the business itself and by other transportation lines, and the interests of the public in the use of the commodity, and its market cost. Imperial Coal Co. v. Pittsburgh & L. E. R. R., 2 Int. Com. Rep. 436, 2 I. C. C. 618 (1889); F. Schumacher Milling Co. v. Chicago, R. I. & P. R. R., 4 Int. Com. Rep. 373, 6 I. C. C. Rep. 61 (1894). The commodities must be similar in order to claim equality of treatment. Live stock and their products are entitled to such treatment. Chicago L. S. Exch. v. Chicago G. W. Ry., 10 I. C. C. Rep. 428 (1905). But not fresh meat and fresh fruit. Miner v. New York, N. H. & H. R. R., 11 I. C. C. Rep. 422 (1905).

A lower export rate may sometimes be justified, but the difference must be a reasonable one; and it would not be proper to make a permanent difference. Re Export and Domestic Rates on Grain, 8 I. C. C. Rep. 214 (1899).

TOPIC D—SPECIAL RATE OR REBATE.

§ 955. What amounts to a rebate.

Any device by which the charge to a shipper is made less than the schedule rate is a rebate, and is forbidden by the act. So the giving of a free pass is forbidden as a rebate. In re Charge to Grand Jury, 66 Fed. 146 (1895); United States v. Cleveland, C. & S. Ry., 3 Int. Com. Rep. 290 (1890); Smith v. Northern Pac. R. R., 1 Int. Com. Rep. 611 (1887); Tuttle v. Northern Pac. R. R., 1 Int. Com. Rep. 588 (1887); Re Boston & M. R. R., 3 Int. Com. Rep. 717 (1891); Harvey v. Louisville & N. R. R., 3 Int. Com. Rep. 793 (1891). So is a discount allowed to shippers of a certain amount of goods within a year. Providence Coal Co. v. Providence & W. R. R., 1 Int. Com. Rep. 363 (1887). So free cartage for the collection and delivery of freight, not mentioned in the published schedule, is an illegal rebate. Wight v. United States, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. 822 (1897); Stone v. Detroit, G. H. & M. Ry., 3 Int. Com. Rep. 60, 3 I. C. C. 613 (1890). This point was not covered by the subsequent litigation in the courts growing out of this decision. Interstate Commerce Commission v. Detroit, G. H. & M. Ry., 167 U. S. 633, 644, 42 L. Ed. , 17 Sup. Ct. 986 (1897); Hezel Milling Co. v. St. Louis, A. & T. H. Ry., 3 Int. Com. Rep. 701, 5 I. C. C. 57 (1891). So the practice of allowing a tank shipper of oil an arbitrary deduction of 42 gallons per tank car is wholly indefensible when no corresponding allowance is made for leakage and evaporation from shipments in barrels. Rice v. Western N. Y. & P. R. R., 3 Int. Com. Rep. 162, 4 I. C. C. 131 (1890); Rice v. Cincinnati, W. & B. R. R., 3 Int. Com. Rep. 841, 5 I. C. C. 193 (1891). So the employment of brokers or scalpers as a device to give low rates is illegal, and a sale by such brokers at less than tariff rates is forbidden. Re Passenger Tariffs, 2 Int. Com. Rep. 445, 2 I. C. C. 649 (1889); Re Underbilling, 1 Int. Com. Rep. 813, 1 I. C. C. 633 (1888). And a device by which a rebate is given to a dummy corporation owned by the shipper, will not defeat the act. United States v. Milwaukee R. T. Co., 142 Fed. 247 (1905).

§ 956. Allowance for cars or facilities furnished by the shipper.

When the shipper furnishes cars or other facilities the carrier may lawfully make an allowance on that account, provided the allowance is

reasonable in amount; an unreasonable allowance under color of compensation for facilities so furnished would constitute an illegal rebate. So a reasonable allowance to an elevator company for elevator service is not an illegal rebate, though the elevator company as a shipper of grain is thereby incidentally aided in its business. Matter of Allowance to Elevators, 10 I. C. C. Rep. 309 (1904). So the allowance of mileage for tank cars furnished by shippers, and low return rates on oil returned in the cars, is not illegal unless the mileage is excessive. Rice v. Cincinnati, W. & B. R. R., 3 Int. Com. Rep. 841, 5 I. C. C. 193 (1891). But when the allowance is unreasonable it constitutes an illegal rebate. Shamberg v. Delaware, L. & W. Ry., 3 Int. Com. Rep. 502, 4 I. C. C. 630 (1890).

§ 957. Division of rate with industrial railway.

A favorite method of securing a rebate by a device has been the formation by a large shipper of an industrial railway from his premises to the railway which treats with the trunk line as a connecting carrier, and thus obtains a division of the rate. This practice appears to be allowable on two conditions: first, that the industrial railway is a *bona fide* common carrier (*ante*, §§ 108-114); second, that the allowance is reasonable. While there may be great objections to allowing shippers to build and operate railroads over which their traffic moves, such action is not prohibited by the act to regulate commerce. And the mere fact that the property of a common carrier is owned by the largest individual shipper over it, or that it was originally constructed for the purpose of doing the work of that shipper, furnishes no reason why it cannot make joint rates and agree upon joint divisions with other railroads. The industrial railway must, however, be a *bona fide* common carrier. Re Transportation of Salt from Hutchinson, 10 I. C. C. Rep. 1 (1904); Re Transportation of Salt, 10 I. C. C. Rep. 148 (1904); Re Division of Joint Rates, 10 I. C. C. Rep. 385 (1904); Central Yellow Pine Assoc. v. Illinois Cent. R. R., 10 I. C. C. Rep. 505 (1905); Re Division of Joint Rates, 10 I. C. C. Rep. 661 (1905). And where excessive divisions of rates are granted by the carrier to another carrier owned and controlled by a shipper, for the purpose of obtaining the traffic of that shipper, they benefit the shipper, and operate as a rebate or other device to cut the tariff charge, in violation of the act. Re Division of Joint Rates, 10 I. C. C. Rep. 385 (1904); Re Division of Joint Rates, 10 I. C. C. Rep. 661 (1905). See United States v. Atchison, T. & S. F. Ry., 142 Fed. 176 (1905).

§ 958. Sale and delivery of commodities by a railroad.

Where a railroad buys or produces commmodities and then sells them and delivers them to the buyer at a price which really nets the road for its transportation charges less than the schedule rates, the transaction in-

volves an illegal rebate. Re Transportation of Coal, 10 I. C. C. Rep. 473 (1905). As Mr. Justice White forcibly said in New York, N. H. & H. R. R. v. Interstate Commerce Commission, 200 U. S. 361, 51 L. Ed. , 26 Sup. Ct. 272 (1906): "The purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all. Now if, by the mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. . . . It is said that when a carrier sells an article which it has purchased and transports that article for delivery, it is both a dealer and a carrier. When, therefore, the price received for the commodity is adequate to pay the published freight rate and something over, the command of the statute as to adherence to the published rates is complied with, because the price will be imputed to the freight rate, and the loss, if any, attributed to the company in its capacity as dealer, and not as a carrier. This simply asserts the proposition which we have disposed of, that a carrier posseses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute."

Consequently it has been held that a railroad company violates the act by buying, transporting and selling grain. Re Alleged Unlawful Rates, 7 I. C. C. Rep. 33 (1897); or coal. New York, N. H. & H. R. R. v. Interstate Commerce Commission, 200 U. S. 361, 51 L. Ed. , 26 Sup. Ct. 272 (1906). It was held by the Commission, to be sure, in Haddock v. Delaware, L. & W. Ry., 3 Int. Com. Rep. 302, 4 I. C. C. 296 (1890), and Coxe v. Lehigh Valley R. R., 3 Int. Com. Rep. 460, 4 I. C. C. 535 (1891), that the two railroads in question might legally mine and sell coal, because they had possessed for a long time before the passage of the act the legal power to do so; and the Commission could only enforce the requirement that their rates for carriage should be reasonable. This decision however must be confined to the precise case, and under the act no railroad can sell and deliver a commodity unless it is entirely clear that it is receiving, in addition to the entire value of the commodity, its full published rates for carriage.

TOPIC E—EXCEPTIONS.

[The justifiable character of certain reductions is discussed in Chapters XXI, XXIII.]

§ 959. Statutory exceptions not exclusive.

The exceptions named in this section of the act are not exclusive; they are given rather by way of example. As Mr. Justice Brown said in Interstate Commerce Commission v. Baltimore & Ohio R. R., 145 U. S. 163, 36 L. Ed. 699, 12 Sup. Ct. 844, 4 Int. Com. Rep. 92 (1892): "The unlawfulness defined by sections 2 and 3 consists either in an 'unjust discrimination' or 'undue or unreasonable preference or advantage,' and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, State or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; inmates of soldiers' homes, etc., and ministers of religion, in favor of whom a reduction of rates had been made for many years before the passage of the act. It may even admit of serious doubt whether, if the mileage, excursion, or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibition of sections 2 and 3. In other words, whether the allowance of a reduced rate to persons agreeing to travel one thousand miles or to go and return by the same road is a 'like and contemporaneous service under substantially similar conditions and circumstances' as is rendered to a person who travels upon an ordinary single trip ticket. If it be so, then, under State laws forbidding unjust discriminations, every such ticket issued between points within the same State must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, State or Federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public, it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons traveling upon them." It was accordingly held in that case that special party-rate tickets sold at a lower rate of fare were legal, though not enumerated in section 22.

Under the amendments of 1906, while this interpretation must remain

unchanged so far as the carriage of goods or the issuance of special forms of ticket is concerned, the enumeration of persons to whom free passes may be issued is so exhaustive and so carefully made that it will probably be held exclusive.

§ 960. Carriage for the government.

The transportation of fish and eggs, distributed by the United States Commission of Fish and Fisheries, is within the exception of section 22 of the act. Re United States Commission of Fish and Fisheries, 1 Int. Com. Rep. 609, 1 I. C. C. 21 (1887). Under this exception a carrier may make special rates with individuals to enable the latter to make proposals to the Interior Department for transportation of Indian supplies, such transportation being for the United States. Re Indian Supplies, 1 Int. Com. Rep. 22 1 I. C. C. 15 (1887).

§ 961. Ministers of religion.

Rates may be reduced for religious teachers as an act of charity. Re Religious Teachers, 1 Int. Com. Rep. 21 (1887). And missionaries are included in the exception. *Ibid.* Application must be made for a pass to the proper authority, or the minister will not be entitled to the reduction. Emerson v. Chicago, R. I. & P. Ry. 6 I. C. C. Rep. 289 (1894).

§ 962. Officers and employees.

The exception allowed in section 22 in favor of officers and employees of road does not include the families of such persons. *Ex parte* Koehler, 31 Fed. 315, 1 Int. Com. Rep. 317 (1887). As Judge Deady said: "The language of the exception is explicit. There is no room for interpretation or construction. The words cannot be made to include the family of an employee, without violence to the apparent purpose of the Legislature. Doubtless it would be expedient to include the immediate family—the wife and minor children—of the employee in this exception. By this means the corporation might, without material cost to itself or prejudice or injustice to anyone, augment in a graceful way the compensation and convenience of faithful servants. But the remedy, if any, is with Congress and not the courts."

§ 963. Mileage, excursion and commutation tickets.

The provision of the Act allowing the issuance of mileage, excursion and commutation tickets, authorizes special rates to commuters, which are less per mile than the charges to other passengers for long distances. The discrimination thus created is not unjust, nor are places outside the commutation territory thereby subjected to undue prejudice. Sprigg v. Baltimore & O. R. R., 8 Int. Com. Rep. 443 (1900).

A party-rate ticket is not a "mileage" or "excursion" ticket, within the provisions of this section; nor does it seem to be included in the phrase "commutation ticket." The words "commutation ticket," in the language of the railway, are principally, if not wholly, used to designate tickets for transportation during a limited time between neighboring towns, or cities and suburban towns. Interstate Commerce Commission v. Baltimore & O. R. R., 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844, 4 Int. Com. Rep. 92 (1892).

Mileage tickets, issued under this clause, must be sold for a reasonable rate and without discrimination. Larrison v. Chicago & G. T. Ry., 1 Int. Com. Rep. 369, 1 I. C. C. 147 (1887); Troy Board of Trade v. Alabama M. Ry., 6 I. C. C. Rep. 1 (1894); Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 6 I. C. C. Rep. 195 (1895).

CHAPTER XXX.

DISCRIMINATION BETWEEN LOCALITIES.

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TOPIC C—LONG AND SHORT HAUL.

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§ 971. Provisions of the statute.

Discrimination between localities.—Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular descrip-

tion of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Interstate Commerce Act, section 3.]

Long and short haul clause.—Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance.

Provided, however, that upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this Act. [Interstate Commerce Act, section 4.]

§ 972. Amendments of 1906.

That part of the Act which forbids discrimination between localities was untouched by the amendments of 1906, in spite of the fact that the administration of the long and short haul clause by the courts had given much dissatisfaction.

TOPIC A—UNDUE PREJUDICE.

[These matters are discussed fully in Chapter XXV.]

§ 973. What constitutes undue prejudice.

It is not enough under the act that freight charges to a certain place should be reasonable. Rates must be relatively reasonable as compared

with those to other places in the same part of the country, in order to prevent unjust discrimination. Boards of Trade Union v. Chicago, M. & S. P. Ry., 1 Int. Com. Rep. 608 (1887); Detroit Board of Trade v. Grand Trunk Ry., 2 Int. Com. Rep. 199, 2 I. C. C. 315 (1888); Re Tariffs of Transcontinental Lines, 2 Int. Com. Rep. 203, 2 I. C. C. 324 (1888); Milwaukee Chamber of Commerce v. Flint & P. M. R. R., 2 Int. Com. Rep. 393, 2 I. C. C. 553 (1889); Manufacturers' & J. Union v. Minneapolis & S. L. Ry., 3 Int. Com. Rep. 115, 4 I. C. C. 79 (1890); Lynchburg Board of Trade v. Old Dominion S. S. Co., 6 I. C. C. Rep. 632 (1896); Phillips v. Louisville & N. R. R., 8 I. C. C. Rep. 93 (1898). This discrimination may be made in other charges as well as transportation charges; for instance, demurrage charges. Pennsylvania Millers' State Assoc. v. Philadelphia & R. R. R., 8 I. C. C. Rep. 531 (1900).

The prejudice is not illegal unless it is undue. New York Produce Exch. v. Baltimore & O. R. R., 7 I. C. C. Rep. 612 (1898). And whether this is the case is a question of fact. United States v. Tozer, 39 Fed. 369, 2 Int. Com. Rep. 597 (1889). In passing upon the question, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other. Interstate Commerce Commission v. Baltimore & O. R. R., 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844, 4 Int. Com. Rep. 92 (1892); Interstate Commerce Commission v. Chicago G. W. Ry., 141 Fed. 1003 (1905); Lincoln Board of Trade v. Missouri Pac. Ry., 2 Int. Com. Rep. 98, 2 I. C. C. 155 (1888); Tifton v. Louisville & N. R. R., 9 I. C. C. Rep. 160 (1902).

In order to violate the Act, the prejudice alleged must result from the act of the carrier charged with it. Wilmington Tariff Assoc. v. Cincinnati, P. & V. A. R., 9 I. C. C. Rep. 118 (1902). A carrier cannot be said to discriminate against a town which it does not reach. Eau Claire Board of Trade v. Chicago, M. & S. P. Ry., 4 Int. Com. Rep. 65, 5 I. C. C. 264 (1892); nor is it responsible for rates made by a connecting road. Crews v. Richmond & D. R. R., 1 Int. Com. Rep. 703, 1 I. C. C. 401 (1888).

§ 974. Distance as a factor in the rate.

In comparing rates from two points to a common destination, distance is the first factor to consider, though it is not controlling or always the most important. As has often been stated, rates are not made on a to-mile basis, and they cannot be expected to bear an exact proportion to the distance. La Crosse M. & J. Union v. Chicago, M. & S. P. Ry., 2 Int. Com. Rep. 9, 1 I. C. C. 629 (1888); Business Men's Assoc. v. Chicago, S. P. M. & O. R. R., 2 Int. Com. Rep. 41, 2 I. C. C. 52 (1888); Business Men's Assoc.

v. Chicago & N. W. Ry., 2 Int. Com. Rep. 48, 2 I. C. C. 73 (1888); Lincoln Board of Trade v. Burlington & M. R. R., 2 Int. Com. Rep. 95, 2 I. C. C. 147 (1888); Poughkeepsie Iron Co. v. New York C. & H. R. R. R., 3 Int. Com. Rep. 248, 4 I. C. C. 195 (1890); James & M. B. Co. v. Cincinnati, N. O. & T. P. Ry., 3 Int. Com. Rep. 682 (1891); Board of Railway Comrs. v. Atchison, T. & S. F. R. R., 8 I. C. C. Rep. 304 (1899). If, however, the localities are neighboring ones and the conditions substantially the same distance should govern. James v. East Tenn., V. & G. R. R., 2 Int. Com Rep. 609, 3 I. C. C. 225 (1889); Eau Claire Board of Trade v. Chicago M. & S. P. Ry., 4 Int. Com. Rep. 65, 5 I. C. C. 264 (1892); Hill v. Nashville, C. & S. L. Ry., 6 I. C. C. Rep. 343 (1895); Brewer v. Louisville & N. R. R., 7 I. C. C. Rep. 224 (1897); Re Alleged Violations of Act, 8 I. C. C. Rep. 290 (1899). In any case the relative difference should not be arbitrary or unreasonable. Toledo Produce Exch. v. Lake Shore & M. S. R. R., 3 Int. Com. Rep. 830, 5 I. C. C. 166 (1891); Gerke Brew. Co. v. Louisville & N. R. R., 4 Int. Com. Rep. 267, 5 I C. C. 596 (1893); Rea v. Mobile & O. Ry., 7 I. C. C. Rep. 43 (1897). The comparative distance should be tested by the distance over the shortest available routes from the place of shipment to the points in question. Milwaukee Chamber of Commerce v. Chicago, M. & St. P. Ry., 7 I. C. C. Rep. 481 (1898).

Ante, §§ 622-632.

§ 975. Group rates.

Group rates, by which neighboring stations are grouped with a competitive point and take the same rates, and the Southern system of basing-points, by which non-competitive stations take the rate to the nearest competitive point plus the local rate thence, are legal, and do not unduly prejudice the non-competitive points. *Ante*, §§ 633-638. The system of basing-points was held illegal by the Interstate Commerce Commission. Hamilton v. Chattanooga, R. & C. R. R., 3 Int. Com. Rep. 482, 4 I. C. C. 686 (1890); Perry v. Florida, C. & P. R. R., 3 Int. Com. Rep. 740, 5 I. C. C. 97 (1891); Hill v. Nashville, C. & S. L. Ry., 6 I. C. C. Rep. 343 (1895); Gustin v. Atchison, T. & S. F. R. R., 8 I. C. C. Rep. 277 (1899); Hampton Board of Trade v. Nashville, C. & S. L. Ry., 8 I. C. C. Rep. 503 (1900). The Supreme Court has, however, held that practice legal. Interstate Commerce Commission v. Louisville & N. R. R., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687 (1903).

§ 976. Difference between through and local rates.

Since a rate for a longer haul may properly be lower in proportion than the rate for a shorter haul, it follows that a through rate over several roads may be proportionally smaller than the local rate over one of the roads; and in the division of a through rate one road may therefore properly accept a smaller amount than it would charge for a carriage only to

or from its terminus. This is not an undue preference against the terminus of its own line. Parsons v. Chicago & N. W. Ry., 63 Fed. 903, 11 C. C. A. 489 (1894), affirmed 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887 (1897); Tozer v. United States, 52 Fed. 917, 4 Int. Com. Rep. 245 (1892); (C. C.); Crews v. Richmond & D. R. R., 1 Int. Com. Rep. 703, 1 I. C. C. 401 (1888); McMorran v. Grand Trunk Ry., 2 Int. Com. Rep. 604, 3 I. C. C. 252 (1889). And, therefore, the inland portion of export rates may, without due discrimination, be less than the domestic rate. Texas & Pac. Ry. v. Interstate Commerce Commission, 162 U. S. 197; Kemble v. Boston & A. R. R., 8 I. C. C. Rep. 110 (1899); Re Export and Domestic Rates, 8 I. C. C. Rep. 214 (1899); modifying the view earlier expressed in Detroit Board of Trade v. Grand Trunk Ry., 2 Int. Com. Rep. 199, 2 I. C. C. 315 (1888); New York Produce Exch. v. New York, C. & H. R. R., 2 Int. Com. Rep. 553, 3 I. C. C. 137 (1889).

As between two points on a connecting line, it would seem that the carrier should not discriminate, but accept the same amount as its share of the through charge on each. Calloway v. Louisville & N. R. R., 7 I. C. C. Rep. 431 (1897). And similarly if a lower through or export rate is allowed to one station on a railroad a similar rate should be allowed to other stations. Re Export and Domestic Rates, 8 I. C. C. Rep. 214 (1899); Chicago F. P. C. Co. v. Chicago & N. W. Ry., 8 I. C. C. Rep. 316 (1899).

§ 977. Equalizing advantages.

A carrier had no right to concern itself with the advantages of one point on its line as against another, or to adjust its tariff so as to equalize the natural advantages between the two places. Localities should not be deprived, through a carrier's adjustment of relative rates, of advantages resulting from their favorable location in respect of cost of raw material supplied from a common source, or of distance to the common market for the finished product, nor of the competitive advantages which the enterprise of its citizens has secured, and upon the strength of which business conditions have grown up. Crews v. Richmond & D. R. R., 1 Int. Com. Rep. 703, 1 I. C. C. 401 (1888); Eau Claire Board of Trade v. Chicago, M. & S. P. Ry., 4 Int. Com. Rep. 65, 5 I. C. C. 264 (1892); Minneapolis Chamber of Commerce v. Great Northern R. R., 4 Int. Com. Rep. 230, 5 I. C. C. 571 (1892); James v. Canadian Pac. R. R., 4 Int. Com. Rep. 274, 5 I. C. C. 612 (1893); Daniels v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 458 (1895); Commercial Club v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 647 (1895); Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 7 I. C. C. Rep. 180 (1897); Danville v. Southern Ry., 8 I. C. C. Rep. 409 (1900); Wichita v. Missouri Pac. Ry., 10 I. C. C. Rep. 35 (1904); Central Y. P. Assoc. v. Vicksburg, S. & P. R. R., 10 I. C. C. Rep. 193 (1904).

On the other hand, the carrier must not for his own interest disturb the natural advantages of a locality and bar it from competing with other places. Thus, when a carrier makes rates to two competing markets, which

give the one monopoly over the other, because it can secure reshipments from the favored locality and none from the other, it goes beyond serving its fair interest, and disregards the statutory requirement of relative equality as between persons, localities and particular descriptions of traffic. Savannah Bureau of Freight & Transp. v. Louisville & N. R. R., 8 I. C. C. Rep. 377 (1899).

And so inequality in treatment of shippers and localities is indefensible where it has no other justification than the diversion by the carrier of through traffic from a shorter route over which it participates in carriage, so as to secure for itself greater aggregate revenue through a long haul by a different route, over which it is also engaged in transportation. Colorado F. & I. Co. v. Southern Pac. Co., 6 I. C. C. Rep. 488 (1895). Nor can railways create artificial differences in market conditions by an arbitrary differential in rates, whereby the product of one section of the country is assigned to one market, and the product of another section of the country to another market. Re Export Rates from Points East and West of Miss. River, 8 I. C. C. Rep. 185 (1899).

Ante, §§ 538-542.

§ 978. Discrimination against staple industry of a locality.

Prejudice against a locality may arise from rates which while not directed against any particular place have the result of injuring a staple industry of a place. Thus this section is violated and Chicago is prejudiced by an unduly high relative rate on live hogs as against packing-house products. Chicago Board of Trade v. Chicago & A. R. R., 3 Int. Com. Rep. 233, 4 I. C. C. 158 (1890); Chicago L. S. Exch. v. Chicago G. W. Ry., 10 I. C. C. Rep. 428 (1905). Duluth is prejudiced by a higher rate on shingles than on lumber. Duluth Shingle Co. v. Duluth S. S. & A. Ry., 10 I. C. C. Rep. 489 (1905). Kansas and Missouri River points are prejudiced by a differential against corn products in favor of corn. Board of Railway Comrs. v. Atchison, T. & S. F. R. R., 8 I. C. C. Rep. 304 (1899); In re Rates in Corn & Corn Products, 11 I. C. C. Rep. 212 (1904). So the localities in Official Classification Territory wherein hay and straw are produced were discriminated against by the act of several carriers in advancing those commodities from the sixth to the fifth class, and thereafter charging fifth class rates for transportation. National Hay Assoc. v. Lake Shore & Michigan S. R. R., 9 I. C. C. Rep. 264 (1902).

§ 979. Milling or compressing in transit.

A carrier may grant to a shipper the right to stop in transit to mill or clean his grain, compress his cotton, or even to search for a local market, and then pursue the journey again, and charge a through rate for the whole transit; and this practice does not unduly prejudice other points. Cowan v. Bond, 39 Fed. 55, 2 Int. Com. Rep. 542 (1889); Listman Mill

Co. v. Chicago, M. & S. P. Ry., 8 I. C. C. Rep. 47 (1898); Re Alleged Unlawful Rates, 8 I. C. C. Rep. 121 (1899); Re Rates and Practices of Mobile & O. Ry., 9 I. C. C. Rep. 373 (1903); St. Louis H. & G. Co. v. Illinois Cent. R. R., 11 I. C. C. Rep. 486 (1905). In order that this privilege may be legal, the agreement for through carriage must be made at the time of the original shipment. Re Alleged Unlawful Rates, 7 I. C. C. Rep. 240 (1897). And the privilege must be extended to all shippers in a certain section of the country, else that place to which the privilege is not given will be unduly prejudiced. Commercial Club v. Chicago, R. I. & P. Ry., 6 I. C. C. 647 (1896); Koch v. Pennsylvania R. R., 10 I. C. C. Rep. 675 (1905).

§ 980. Discrimination in facilities.

Discrimination against localities may be made in facilities for traffic, as well as in rates. Thus if the time allowed at terminals for loading or unloading is reasonable, and that allowed at interior points is unreasonably small, then an undue prejudice to the interior points may result. Pennsylvania Millers' State Assoc. v. Philadelphia & R. R. R., 8 I. C. C. Rep. 531 (1900). So discrimination may result from an unfair distribution of cars in favor of a station. Hawkins v. Wheeling & L. E. Ry., 9 I. C. C. Rep. 212 (1902). From delaying to furnish cars at a station. Hawkins v. Lake Shore & M. S. R. R., 9 I. C. C. Rep. 207 (1902). From an unusually early hour of closing the freight station in a certain city. Cincinnati Chamber of Commerce v. Baltimore & O. R. R., 10 I. C. C. Rep. 378 (1905). But there is no discrimination against localities by an arrangement among carriers dividing the traffic of transporting immigrants from Atlantic ports westward in agreed proportions, where the immigrants are transported at domestic published rates. Re Transportation of Immigrants from New York, 10 I. C. C. Rep. 13 (1904).

§ 981. Instances of local discrimination.

The Commission has considered and passed upon claims of local discrimination made by the following localities:

Biloxi—Dunbar v. Louisville & N. R. R., 1 Int. Com. Rep. 592 (1887).

Boston—Re Export Trade of Boston, 1 Int. Com. Rep. 18, 23, 25 (1887); Re Fitchburg R. R., 1 Int. Com. Rep. 26 (1887); Boston Chamber of Commerce v. Boston & A. R. R., 1 Int. Com. Rep. 604 (1887).

Buffalo—Re Grand Trunk Ry., 2 Int. Com. Rep. 496 (1889).

Danville—Danville v. Southern Ry., 8 I. C. C. Rep. 409 (1900).

Dawson—Dawson Board of Trade v. Central of Georgia R. R., 8 I. C. C. Rep. 142 (1899).

Delaware—Delaware State Grange v. New York, P. & N. R. R., 1 Int. Com. Rep. 649 (1887).

Denver—Kindel v. Atchison, T. & S. F. R. R., 8 I. C. C. Rep. 608 (1900), 9 I. C. C. Rep. 606 (1903).

Detroit—Detroit Board of Trade v. Grand T. Ry., 1 Int. Com. Rep. 701 (1888).

Hartford—Hartford & N. Y. T. Co. v. New York & N. E. R. R., 1 Int. Com. Rep. 314 (1887).

Hartwell, Ga.—McMullan v. Richmond & D. R. R., 1 Int. Com. Rep. 483 (1887).

Hot Springs, N. C.—Hot Springs v. Western N. C. R. R., 1 Int. Com. Rep. 316 (1887).

Hudson, Minn.—Fulton v. Chicago, S. P., M. & O. Ry., 1 Int. Com. Rep. 375 (1887).

La Grange—Calloway v. Louisville & N. R. R., 7 I. C. C. Rep. 431 (1897).

Lincoln, Neb.—Lincoln Board of Trade v. Chicago, B. & Q. R. R., 1 Int. Com. Rep. 647 (1887); Lincoln Board of Trade v. Union Pac. Ry., 1 Int. Com. Rep. 702 (1888).

Marshallville, Ga.—Slappey v. Central R. R., 1 Int. Com. Rep. 812 (1888).

Memphis—Re Louisville & N. R. R., 4 Int. Com. Rep. 157 (1892).

Milwaukee—Milwaukee Chamber of Commerce v. Flint & P. M. R. R., 1 Int. Com. Rep. 792 (1888).

Minneapolis—Re St. Louis Millers' Assoc., 1 Int. Com. Rep. 22 (1887).

Myrick, Mo.—McGrew v. Missouri Pac. Ry., 8 I. C. C. Rep. 630 (1901).

New Orleans—New Orleans Cotton Exch. v. New Orleans, C. & T. P. Ry., 1 Int. Com. Rep. 648 (1887).

New York—New York Produce Exch. v. Baltimore & O. R. R., 7 I. C. C. Rep. 612 (1898).

Norfolk, Neb.—Johnson v. Chicago, S. P., M. & O. Ry., 9 I. C. C. Rep. 221 (1899).

Opelika, Ala.—Harwell v. Columbus & W. Ry., 1 Int. Com. Rep. 631, 1 I. C. C. 236 (1887).

Phillipstown—Allegheny R. C. P. Assoc. v. Allegheny Valley R. R., 1 Int. Com. Rep. 604 (1887).

Providence—Providence Coal Co. v. Providence & W. R. R., 1 Int. Com. Rep. 363 (1887).

Savannah—Savannah Bureau of F. & T. v. Charleston & S. Ry., 7 I. C. C. Rep. 458 (1897).

Sioux City—Grain Shippers' Assoc. v. Illinois Cent. R. R., 8 I. C. C. Rep. 158 (1899).

Tifton, Ga.—Tifton v. Louisville & N. R. R., 9 I. C. C. Rep. 160 (1902).

Walla Walla—Evans v. Oregon Ry. & Nav. Co., 1 Int. Com. Rep. 641 (1887).

West Virginia—National W. L. D. Assoc. v. Norfolk & W. R. R., 9 I. C. C. Rep. 87 (1901).

Wichita—Wichita v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 507,

534 (1903); Wichita v. Chicago, R. I. & P. Ry., 10 I. C. C. Rep. 569 (1905); Wichita v. Missouri Pac. Ry., 10 I. C. C. Rep. 35 (1904).

Wilmington, N. C.—Hilton Lumber Co. v. Wilmington & W. R. R., 9 I. C. C. Rep. 17 (1901); Dewey v. Baltimore & O. R. R., 11 I. C. C. Rep. 475 (1905).

TOPIC B—SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS.

[See, generally, Chapter XIX.]

§ 982. Substantial difference of conditions.

Circumstances which reasonably compel a carrier to make a difference in his rates between two places will prevent the difference from being illegal. Thus anything which increases the cost of service at a certain place will justify a higher rate. This was held in cases where the increased cost was caused by unusual grades and difficulty of operation: Brockway v. Ulster & D. R. R., 8 I. C. C. Rep. 21 (1898); by the necessity of crossing a river on a toll bridge: Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 7 I. C. C. Rep. 180 (1897); Commercial Club v. Chicago & N. W. Ry., 7 I. C. C. Rep. 386 (1897); and by heavy terminal charges. Rice v. Western N. Y. & P. Ry., 2 Int. Com. Rep. 298, 2 I. C. C. 389 (1888). So a higher rate may be maintained to a branch-line point than to neighboring stations on the main line. Lehmann v. Texas & P. Ry., 3 Int. Com. Rep. 706, 5 I. C. C. 44 (1891). Other circumstances than cost to the carrier may be considered. So where a station is situated over a mile from the business center of a city, free cartage is justified, though it is not given in a neighboring city where the station is near the business center. Interstate Commerce Commission v. Detroit, G. H. & M. Ry., 167 U. S. 633 (1897).

On the other hand, circumstances are not so dissimilar as to justify a preference because the city preferred has subscribed toward building the road. Lincoln Board of Trade v. Burlington & M. R. R. R., 2 Int. Com. Rep. 95, 2 I. C. C. 147 (1888). Or because the preferred city is much larger and has more important and extensive business interests than the other. Troy Board of Trade v. Alabama M. Ry., 4 Int. Com. Rep. 348, 6 I. C. C. 1 (1894). Nor is a preference permitted because the railroad is poor and will only thus be able to earn a proper return. Brewer v. Louisville & N. R. R., 7 I. C. C. Rep. 224 (1897). Or its line is long and circuitous and it is obliged to make the concession in order to share the traffic. Boston & A. R. R. v. Boston & L. R. R., 1 Int. Com. Rep. 500, 1 I. C. C. 158 (1887).

Even if a preference is justified, the amount of it must be no greater

than is required by the conditions. Brady v. Pennsylvania R. R., 2 Int. Com. Rep. 78, 2 I. C. C. 131 (1888).

§ 983. Competition.

It is now well settled that competition with other carriers at a certain point justifies a lower rate at that point than at neighboring non-competitive points. The Interstate Commerce Commission at first allowed this with some reluctance, though on the whole, following the English authorities, they allowed it to be considered; but the matter is now settled by the decisions of the Supreme Court, which allow competition full play. Cincinnati, New Orleans & Texas Pacific Ry. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935, B. & W. 424 (1896); Interstate Commerce Commission v. Alabama Midland Ry., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414, B. & W. 433 (1897); Louisville & Nashville R. R. v. Behlmer, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. Ed. 309 (1900); East Tennessee, Virginia & Georgia Ry. v. Interstate Commerce Commission, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719 (1901); Texas & Pacific Ry. v. Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940 (1896); Interstate Commerce Commission v. Louisville & Nashville R. R., 190 U. S. 273, 23 Sup. Ct. 687, 47 L. Ed. 1047 (1903); Interstate Commerce Commission v. Nashville, C. & S. L. Ry., 120 Fed. 934, 57 C. C. A. 224 (1903); Interstate Commerce Commission v. Cincinnati, P. & V. R. R., 124 Fed. 624 (1903); Interstate Commerce Commission v. Chicago G. W. Ry., 141 Fed. 1003 (1905); Savannah Bureau v. Charleston & S. Ry., 7 I. C. C. Rep. 458 (1897); Cattle Raisers' Assoc. v. Fort Worth & D. C. Ry., 7 I. C. C. Rep. 513 (1898); Ulric & Lake Shore & M. S. R. R., 9 I. C. C. Rep. 495 (1903); Wichita v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 558 (1903); Wichita v. Chicago, R. I. & P. Ry., 9 I. C. C. 569 (1903); G. C. Pratt Lumber Co. v. Chicago, I. & LR.y., 10 I. C. C. Rep. 29 (1904); Chattanooga Chamber of Commerce v. Southern Ry., 10 I. C. C. Rep. 111 (1904); Aberdeen Group Com. Assoc. v. Mobile & O. Ry., 10 I. C. C. Rep. 289 (1904); Charlotte Shippers' Assoc. v. Southern Ry., 11 I. C. C. Rep. 108 (1905); Spiegle v. Chesapeake & O. Ry., 11 I. C. C. Rep. 367 (1905); Griffin Grocery Co. v. Southern Ry., 11 I. C. C. Rep. 522 (1906). But the amount of discrimination must be no greater than is necessary to meet the competition, the lower rate must be remunerative and the higher rate reasonable. Grain Shippers' Assoc. v. Illinois Cent. R. R., 8 I. C. C. Rep. 158 (1899); Holdzkom v. Michigan Cent. R. R., 9 I. C. C. Rep. 42 (1901); Marten v. Louisville & N. R. R., 9 I. C. C. Rep. 581 (1903); Gardner v. Southern Ry., 10 I. C. C. Rep. 342 (1904); Mershon S. P. & Co. v. Central R. R., 10 I. C. C. Rep. 456 (1905); Lehmann-Higginson Grocery Co. v. Atchison, T. & S. F. R. R., 10 I. C. C. Rep. 460 (1905); Cannon Falls E. E. Co. v. Chicago G. W. Ry., 10 I. C. C. Rep. 650 (1905). Efforts have been made to limit this rule, as by estimating the

force of the competition, but they seem to have been unsuccessful. See George Tileston Milling Co. v. Northern Pac. R. R., 8 I. C. C. Rep. 346 (1899). As between two points where there is free competition there must be no discrimination. Dawson Board of Trade v. Central of Georgia R. R., 8 I. C. C. Rep. 142 (1899); Hilton Lumber Co. v. Wilmington & W. R. R., 9 I. C. C. Rep. 17 (1901).

TOPIC C—LONG AND SHORT HAUL.

[See, generally, Chapter XXV.]

§ 984. General principles governing the section.

The statute forbids the charge of greater rate for longer haul in all cases unless the circumstances are shown to be substantially similar. Missouri Pac. Ry. v. Texas & P. Ry., 31 Fed. 862 (1887); Re Southern R. & S. Assoc., 1 Int. Com. Rep. 278 (1887); Calloway v. Louisville & N. R. R., 7 I. C. C. Rep. 431 (1897). It is not a violation of the act to charge the same for the short as for the longer haul. Milk Producers' Assoc. v. Delaware L. & W. R. R., 7 I. C. C. Rep. 92 (1897). The charge is for transportation; demurrage charges are not included in this section. Pennsylvania Millers' State Assoc. v. Philadelphia & R. R. R., 8 I. C. C. Rep. 531 (1900). Nor is it to be determined by the proportion of a through rate received. Imperial Coal Co. v. Pittsburgh & L. E. Ry., 2 Int. Com. Rep. 436 (1889).

The question whether a haul is shorter or longer should be determined by the length of the shortest route in each case. Ulric v. Lake Shore & M. S. R. R., 9 I. C. C. Rep. 495 (1903). See Hill v. Nashville, C. & S. L. Ry., 6 I. C. C. Rep. 343 (1895).

Though the long and short haul section does not apply because of dissimilar circumstances the preceeding sections of the act apply. Re Louisville & N. R. R., 1 Int. Com. Rep. 278 (1887).

That there is a greater market for the commodity at the longer than at the shorter distance point does not create a substantial dissimilarity in circumstances and conditions. Fewell v. Richmond & D. R. R., 7 I. C. C. Rep. 354 (1897). Nor do joint tariffs nor an arrangement by the carriers with a wagon transportation company extending through lines to points not reached by railroads. Cary v. Eureka Springs Ry., 7 I. C. C. Rep. 286 (1897). But where two railroad companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads a new and independent line, and the through tariff on the joint line is not the standard by which the separate tariff of either company is to be measured in determining whether such separate tariff violates the long and short haul clause. Chicago & N. W. Ry. v. Osborne, 52 Fed. 912, 3 C. C. A. 347 (1892) reversing Osborne v. Chicago & N. W. Ry., 48 Fed. 49 (1891), and Junod v. Chicago & N. W. Ry., 47 Fed. 290 (1891); United States v. Mellen, 53 Fed. 229 (1892).

§ 985. Competition.

As is the case with section 3 of the act (*ante*, § 983), competition constitutes a dissimilar circumstance and justifies a less charge for the longer than for the shorter haul. This has been so thoroughly established by the decisions of the Supreme ourt that the earlier holdings of the Commission are unimportant. Interstate Commerce Commission v. Alabama Midland Ry., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45, B. & W. 433 (1897); East Tenn. V. & G. Ry. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516 (1901); Interstate Commerce Commission v. Clyde S. S. Co., 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512 (1901); Interstate Commerce Commission v. Louisville & N. R. R., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687 (1903); *Ex parte* Koehler, 31 Fed. 315 (1887); Interstate Commerce Commission v. Southern Ry., 105 Fed. 703 (1900); Interstate Commerce Commission v. Southern Ry., 122 Fed. 800 (1903); Rocky Hill Buggy Co. v. Southern Ry., 11 I. C. C. Rep. 229 (1905).

The competition may be that of other carriers subject to the act. Interstate Commerce Commission v. Clyde S. S. Co., 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512 (1901). And it is effective for the purpose, though there was once competition at the non-competitive point which has been prevented by a consolidation of the railroads at that point. Interstate Commerce Commission v. Southern Ry., 117 Fed. 741 (1902). The competition must be real and substantial. East Tennessee V. & G. Ry. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. Ed. 719, 21 Sup. 516 (1901). The question will be found fully discussed elsewhere (*ante*, §§ 854-861.)

§ 986. Relief from operation of the section.

The power given by the statute to the Commission to give relief from the long and short haul clause has been made practically useless by the decisions of the courts that where dissimilar circumstances exist it is not necessary to apply to the Commission for relief. East Tenn. V. & G. Ry. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516 (1901); Interstate Commerce Commission v. Atchison, T. & S. F. R. R., 50 Fed. 295 (1892), appeal dismissed 81 Fed. 1005, 26 C. C. A. 685 (1896). The application has accordingly been made of late years only in extraordinary cases, such as failure of crops. Re Fremont E. & M. V. R. R., 6 I. C. C. Rep. 293 (1895); World's Fair, Re Rome, W. & O. R. R., 6 I. C. C. Rep. 328 (1895). Sudden resort to the Klondike. Re Atchison, T. & S. F. R. R., 7 I. C. C. Rep. 593 (1898). No general rule can be laid down for such cases. Re Cincinnati, H. & D. R. R., 6 I. C. C. Rep. 323 (1895).

The act does not authorize the Commission to require exceptions. Thatcher v. Fitchburg R. R., 1 Int. Com. Rep. 356 (1887).

CHAPTER XXXI.

INTERCHANGE OF TRAFFIC AND POOLING AGREEMENTS.

§ 991. Provisions of the statute.
992. Amendments of 1906.

TOPIC A—REASONABLE FACILITIES FOR INTERCHANGE.

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994. Carriage through in same car.
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TOPIC B—THROUGH ROUTING AND RATING.

§ 999. Carriers not compelled to route, bill or rate through.
1000. Carrier may select connecting line.
1001. Establishment of through route by agreement.

TOPIC C—PROHIBITION OF POOLING.

§ 1002. Pooling.

§ 991. Provisions of the statute.

Facilities for interchange of traffic: discrimination between connecting lines: use of tracks and terminal facilities.—Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this

shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. [Interstate Commerce Act, section 3.]

Duty to establish through routes and rates.—It shall be the duty of every carrier subject to the provisions of this Act—to establish through routes and just and reasonable rates applicable thereto. [Act of June 29, 1906, section 1.]

Routes specified in schedule: consent of connecting carriers.—The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties. [Act of June 29, 1906, section 2.]

Joint routes and rates ordered by Commission.—The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line. [Interstate Commerce Act, section 15, as amended by Act of June 29, 1906, section 4.]

Through billing, liability for loss on connecting line.—Any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor

and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

The common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof. [Interstate Commerce Act, section 20, as amended by the Act of June 29, 1906, section 7.]

Through carriage.—Sec. 7. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

Pooling.—It shall be unlawful for any common carrier subject to the provisions of this Act to enter into a contract, agree-

ment, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof;

And in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offence. [Interstate Commerce Act, section 5.]

§ 992. Amendments of 1906.

The provisions for compulsory through routing, rating and billing are new. The anti-pooling section of the original act is unchanged by the new act.

TOPIC A—REASONABLE FACILITIES FOR INTERCHANGE.

[These matters are discussed in Chapter XXV.]

§ 993. Extent of application of the provision.

What are reasonable facilities for an interchange of business between connecting railroad companies, within the requirements of the Interstate Commerce Act, depends upon the state of the traffic and the business; and the question is to be determined by what is considered reasonable by the public, and what is required to conveniently transact the business. Oregon Short Line & U. N. Ry. v. Northern P. R. R., 51 Fed. 465, 3 Int. Com. Rep. 205 (1892). Facilities may be denied in any manner, as by an unreasonable arrangement of time schedules. New York & N. Ry. v. New York & N. E. R. R., 50 Fed. 867, 4 Int. Com. Rep. 116 (1892).

The provisions of the section apply not merely to the carriers themselves, but with equal force to their officers and employees. Therefore the act is violated by employees who by concerted action strike in order to avoid receiving cars from a connecting carrier. Toledo, A. A. & N. M. Ry. v. Pennsylvania Co., 54 Fed. 746, 5 Int. Com. Rep. 545 (1891), appeal dismissed, *Ex parte* Lemon, 150 U. S. 393, 37 L. Ed. 1120, 14 Sup. Ct. 123 (1893).

The intervention between two railroads of a terminal system owned by an independent company will not prevent the roads from being connecting lines, within the meaning of the section. Oregon Short Line v. Northern Pac. R. R., 51 Fed. 465, 3 Int. Com. Rep. 205 (1892).

§ 994. Carriage through in same car.

Whether a railroad is compelled by its duty to afford reasonable facilities for interchange of traffic to receive a carload of freight from a connecting road and carry it through without breaking bulk is not altogether

clear on the authorities. In Chicago, B. & Q. R. R. v. Burlington, C. R. & N. Ry., 34 Fed. 481 (1888), it was held that a boycotted road could compel a connecting road to do so, in spite of a threatened strike of its employees. In Oregon Short Line v. Northern Pacific R. R., 51 Fed. 465, 3 Int. Com. Rep. 205, and on appeal 61 Fed. 158, 9 C. C. A. 409, 4 Int. Com. Rep. 718 (1894), on the other hand it was held that this could not be done. Judge Thayer in Little Rock & M. R. R. v. St. Louis S. W. Ry., 63 Fed. 775, 11 C. C. A. 417, B. & W. 277 (1894), the qualification stated by Mr. Justice Field in the Oregon Short Line case was emphasized. "The third section of the Interstate Commerce Act does not require an interstate carrier to receive freight in the cars in which it is tendered by a connecting carrier, and to transport it in such cars, paying a mileage rate thereon, when it has cars of its own that are available for the service, and the freight will not be injured by transfer." This moderate statement represents the condition of the authorities. The question is settled by the amendment of 1906 by which through routing is required.

§ 995. Continuous carriage.

Contracts by a railroad company with other companies for the establishment of through routes and through rates for the continuous carriage of interstate traffic do not violate section 7 of the Act to Regulate Commerce, prohibiting a combination to prevent the carriage of freight from being continuous. Kentucky & I. Bridge Co. v. Louisville & N. R. R., 37 Fed. 571, 2 Int. Com. Rep. 351, 2 L. R. A. 289 (1888). Nor is it prevented by a refusal of the connecting carrier to take the goods at the valuation agreed on by the first carrier. Pennsylvania R. R. v. Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. 132 (1903).

§ 996. Discrimination between connecting lines.

Though not expressly contained in this clause of the act it is nevertheless to be understood that discrimination is not forbidden unless it is undue or unreasonable. Thus in making contracts for through transportation of passengers, the initial carrier may lawfully prefer a road going through to the point of destination to one going only part of the way, an arrangement with which would necessitate further arrangements to reach the desired point. Little Rock & M. R. R. v. East Tennessee, V. & G. R. R., 47 Fed. 771, 4 Int. Com. Rep. 261 (1891). A combination of independent carriers by which one is to prefer the other to another connecting line outside of the combination does not justify discrimination between the connecting lines. New York & N. Ry. v. New York & N. E. R. R., 50 Fed. 867, 4 Int. Com. Rep. 116 (1892); Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 4 Int. Com. Rep. 592, 6 I. C. C. 195 (1894). But a railroad may prefer itself to a rival, even a connecting rival. So a railroad company op-

erating steamers in connection with its railroad as a single line is not guilty of a discrimination against another carrier, within the prohibition of the interstate commerce act, by refusing to allow a rival steamboat company to land its boats at a wharf used by it solely for connecting its railroad and boats, where there is no regular public station at such wharf, but the general station is at a little distance and ample facilities there exist. Ilwaco R. & Nav. Co. v. Oregon S. L. & U. N. Ry., 57 Fed. 673, 6 C. C. A. 495, 5 Int. Com. Rep. 627, B. & W. 275 (1893).

So a railroad does not violate the act by making and carrying out an exclusive contract with a stock yards company for the exclusive delivery to that company of live stock in the city of Louisville, although in carrying out such contract it refuses to deliver to another railroad company, for delivery to a competing stock yards, live stock consigned to such competing stock yards; for, as Mr. Justice Holmes remarked, the favored stock yards "are the defendant's depot. They are its depot none the less that they are so by contract, and not by virtue of a title in fee. Unless a preference of its own depot to that of another road is forbidden, the defendant is not within the act of Congress. Suppose that the Southern Railway station and the Louisville & Nashville station were side by side, and that their tracks were connected within or just outside the limits of the station grounds. It could not be said that the defendant was giving an undue or unreasonable preference to itself or subjecting its neighbor to an undue or unreasonable disadvantage if it insisted on delivering live stock which it had carried to the end of the transit at its own yard." Central Stock Yards Co. v. Louisville & N. R. R., 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339 (1904); Railroad Commission of Kentucky v. Louisville & N. R. R., 10 I. C. C. Rep. 173 (1904).

Under this provision a car company is not a connecting carrier, and is not entitled to protection. Burton Stock Car Co. v. Chicago & A. R. R., 1 Int. Com. Rep. 329 (1887); Worcester Excursion Car Co. v. Pennsylvania R. R., 2 Int. Com. Rep. 792, 3 I. C. C. 577 (1890). Neither is a bridge company. Kentucky & I. Bridge Co. v. Louisville & N. R. R., 37 Fed. 571, 2 L. R. A. 289, 2 Int. Com. Rep. 102 (1888).

§ 997. Discrimination in furnishing optional facilities.

Certain facilities are entirely optional with the carrier; either by express provision of the statute, such as terminal facilities, or by their nature. So a carrier may furnish to one connecting road and not to another trackage and terminal facilities. Little Rock & M. R. R. v. St. Louis, I. M. & S. Ry., 59 Fed. 400 (1894). So it may accept goods from one carrier without prepayment of charges, while it requires prepayment of charges from another. Little Rock & M. R. R. v. St. Louis, I. M. & S. Ry., 59 Fed. 400 (1894); Little Rock & M. R. R. v. St. Louis S. W. Ry., 63 Fed. 775, 11 C. C. A. 417, 4 Int. Com. Rep. 854, B. & W. 277 (1894). So

it may make through billing and routing arrangements with one connecting line while declining to do so with another. Little Rock & M. R. R. v. East Tenn. V. & G. R. R., 47 Fed. 771, 4 Int. Com. Rep. 261 (1891); Oregon Short Line v. Northern Pac. R. R., 51 Fed. 465, 3 Int. Com. Rep. 205 (1891), affirmed 61 Fed. 158, 9 C. C. A. 409, 4 Int. Com. Rep. 718 (1894); Little Rock & M. R. R. v. St. Louis, I. M. & S. Ry., 59 Fed. 400 (1894); Little Rock & M. R. R. v. St. Louis S. W. Ry., 63 Fed. 775, 11 C. C. A. 417, 4 Int. Com. Rep. 854, B. & W. 277 (1894); St. Louis Drayage Co. v. Louisville & N. R. R., 65 Fed. 39, 5 Int. Com. Rep. 137 (1894); Prescott & A. C. R. R. v. Atchison, T. & S. F. R. R., 73 Fed. 438 (explaining New York & N. Ry. v. New York & N. E. R. R., 50 Fed. 867), appeal dismissed 84 Fed. 213, 28 C. C. A. 481 (1897); Gulf C. & S. F. R. R. v. Miama S. S. Co., 86 Fed. 407, 30 C. C. A. 142, 52 U. S. App. 732 (1898).

§ 998. Use of tracks or terminal facilities.

This provision modifies the requirement for reasonable facilities for interchange of traffic. It imposes upon a carrier no duty either to form new connections or to establish new stations, yards, or depots, or to pay any part of the expense of providing such new facilities, either for the convenience of the public or of other carriers; and a carrier cannot be compelled to receive or deliver traffic at a point where another company has made a new connection with its roads, but has not provided proper facilities. Kentucky & I. B. Co. v. Louisville & N. R. R., 37 Fed. 571, 2 Int. Com. Rep. 102, 2 L. R. A. 289 (1888).

The provision is merely negative. It does not affect either a contract or a State statute giving another carrier the right to use tracks and terminal facilities. Iowa v. Chicago, M. & S. P. Ry., 33 Fed. 391 (1887), appeal dismissed, Chicago, B. & Q. R. R. v. Iowa, 145 U. S. 631, 36 L. Ed. 857, 12 Sup. Ct. 978 (1892).

"Terminal facilities" refers to facilities for interchanging traffic between connecting lines. Chicago F. P. C. Co. v. Chicago & N. W. Ry., 8 I. C. C. Rep. 316 (1899).

TOPIC B—THROUGH ROUTING AND RATING.

[See Chapter XIX.]

§ 999. Carriers not compelled to route, bill or rate through.

Under the original act no power was given to the Commission to compel through billing, routing or rating by connecting lines. This can be done only by contract or arrangement between the carriers, and the act does not compel connecting carriers to make mutual contracts. Central Stock Yards Co. v. Louisville & N. R. R., 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339 (1904); Kentucky & I. Bridge Co. v. Louisville & N. R. R., 2 L. R. A. 289, 2 Int. Com. Rep. 351, 37 Fed. 567, 629, 630 (1888); Little Rock

& M. R. R. Co. v. St. Louis, I. M. & S. Ry., 2 Int. Com Rep. 763, 41 Fed. 559 (1890); Chicago & N. W. Ry. v. Osborne, 3 C. C. A. 347, 4 Int. Com. Rep. 257, 52 Fed. 915 (1892); Oregon Short Line & U. N. Ry. v. Northern P. R. R., 4 Int. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158, affirming 4 Int. Com. Rep. 249, 51 Fed. 465 (1894); Little Rock & M. R. Co. v. St. Louis S. W. R. Co., 26 L. R. A. 192, 4 Int. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 280, 63 Fed. 775, B. & W. 277 (1894); St. Louis Drayage Co. v. Louisville & N. R. Co., 5 Int. Com. Rep. 137, 65 Fed. 39 (1889); Allen v. Oregon R. & Nav. Co., 98 Fed. 16 (1899); Mattingly v. Pennsylvania Co., 2 Int. Com. Rep. 806, 3 I. C. C. 592 (1890); Re Clark, 2 Int. Com. Rep. 797, 3 I. C. C. 649 (1890); Re Joint Water & Rail Lines, 2 Int. Com. Rep. 486, 2 I. C. C. 645 (1889); Capehart v. Louisville & N. R. R., 3 Int. Com. Rep. 278, 4 I. C. C. 265 (1890); Commercial Club v. Chicago, R. I. & P. Ry., 6 I. C. C. Rep. 647 (1896); New York, N. H. & H. R. R. v. Platt, 7 I. C. C. Rep. 323 (1897); Savannah Bureau of Freight & Transp. v. Louisville & N. R. R., 8 I. C. C. Rep. 377 (1899). For this reason one railroad can sell tickets over the road of another company only by agreement. Chicago & A. R. R. v. Pennsylvania Co., 1 Int. Com. Rep. 357, 1 I. C. C. 86 (1887).

Under the amendment of 1906, however, connecting carriers may be compelled to form a through route, and to bill and rate through.

§ 1000. Carrier may select connecting line.

A carrier which makes a through rate may select such connecting line as he pleases for the forwarding of traffic, and is not obliged to ship on by the line selected by the shipper. This was denied by the Commission in Consolidated Forwarding Co. v. Southern Pac. Co., 9 I. C. C. Rep. 182 (1902), but was finally so held by the Supreme Court. Southern Pacific Co. v. Interstate Commerce Commission, 200 U. S. 536, L. Ed. , 26 Sup. Ct. 330 (1906).

This is, however, changed by the provisions of the Act of 1906, which requires the through route to be named by the carrier and the consent of the connecting lines obtained.

§ 1001. Establishment of through route by agreement.

When, however, a through route has been established by agreement of the carriers, every shipper must be allowwed the benefit of it. Rea v. Mobile & O. Ry., 7 I. C. C. Rep. 43 (1897). The carriers establishing it must be prepared to furnish suitable instrumentalities of shipment and carriage. Independent Refiners' Assoc. v. Western N. Y. & P. Ry., 6 I. C. C. Rep. 378 (1895). If any mistake is made by the first carrier in forwarding over the route that carrier is responsible. Pond-Decker Lumber Co. v. Spencer, 86 Fed. 846 (1898).

TOPIC C—PROHIBITION OF POOLING.

§ 1002. Pooling.

Any arrangement, oral or otherwise, or combination, which has for its purpose and eventuates in the pooling of freights of different and competing railroads, comes within the inhibition of the act. The statute contemplates two methods of pooling, both of which are prohibited: First, a physical pool, which means a distribution by the carriers of property offered for transportation among different and competing railroads in proportions and on percentages previously agreed upon; and, secondly, a money pool, which is described best in the language of the statute, "to divide between them [different and competing railroads] the aggregate or net proceeds of the earnings of such railroads, or any portion thereof." The statute provides for the indictment not only of the carrier itself, but also of the officers individually where the carrier is a corporation, so that in such case both are indictable. In re Pooling Freights, 115 Fed. 588 (1902).

Division of territory among existing roads appears to be forbidden by the act. Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 4 Int. Com. Rep. 592, 6 I. C. C. 195 (1894). But apparently an agreement between railroads for a division of territory into which each may extend branch lines is not covered by the act. Ives v. Smith, 8 N. Y. Supp. 46 (1889).

Railway companies which enter into an association to control traffic to a common market, and maintain rates higher than are reasonable, unjustly prejudicial, and preferential, if not jointly liable, are at least severally liable under this provision; and the "fines" or "penalties" imposed by the provisions of the agreement of the Southern Railway & Steamship Association on members for violation of association rules appear on the face of that agreement to be available as substitutes for payment which would be exacted under a regular pooling system, and the arrangement under which they are imposed is tantamount to a combination, contract, or agreement "for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof," which are forbidden by the statute. Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 4 Int. Com. Rep. 592, 6 I. C. C. 195 (1894).

The Interstate Commerce Commission has held that it is at least doubtful whether section five of the act applies to a practice whereby the transportation of immigrants from Atlantic ports westward is divided between the carriers in agreed proportions based upon the proportion of the domestic passenger traffic done by each line, where such a practice cannot be made effective in respect to any other class of passenger business, and the immigrants are carried at domestic published rates, and the arrangements adopted by the carriers in connection with the immigration authorities of the United States have efficiently promoted the protection and greatly im-

proved the treatment and comfort of immigrants. Re Transportation of Immigrants from New York, 10 I. C. C. Rep. 13 (1904).

Certain transcontinental carriers adopted as part of an agreement for a through rate from California to the East, for oranges and other citrus fruits, a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guaranteeing the through rates to the shipper. The initial carrier promised fair treatment to the connecting lines, and carried out such promise, but there was no agreement to give any specific amount of tonnage to any particular connecting line. The rule was intended to break up rebating by the connecting lines, and, in its practical operation, the actual routing was generally conceded to the shipper, and his requests to divert shipments *en route* were usually allowed. It was held that this was not a pooling of freights such as is forbidden by the act. Southern Pacific Co. v. Interstate Commerce Commission, 200 U. S. 536, 26 Sup. Ct. 330 (1906).

CHAPTER XXXII.

SCHEDULES OF RATES.

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§ 1029. Invalidity of the varied rate.

§ 1011. Provisions of the statute.

Filing and posting schedules of rates, individual and joint.—Every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also

in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

Changes in rates.—No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedues in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

Route specified: consent of connecting carriers.—The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be

necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Filing copies of contracts, &c.—Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

Form of schedules.—The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

Carrier must not carry unless rates filed.—No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs; *Provided,* That whenever the word "carrier" occurs in this Act it shall be held to mean "common carrier." [Interstate Commerce Act, section 6, as amended by Act of June 29, 1906, section 2.]

§ 1012. **Amendments of 1906.**

In the Act of 1906 section 6 of the original act has been recast, so as to make it simpler and more concise. Thus instead of separate clauses for

joint tariffs and for filing the schedules with the Commission, the new section applies in each part to both individual and joint rates, and commands in the same clause both the publication and the filing of the tariff. The principal additions in the new act are these:

1. If there is a through route, but no joint rate has been established, the separate rates over the whole route must be published.

2. Special charges and all privileges and facilities granted must be published. This was required previously by decision of the Commission, and is now expressly stated in the act.

3. The schedule is not only to be posted in stations but to be *kept* posted in two public and conspicuous places in every station.

4. No change in rate shall be made without thirty days' notice to the Commission and the public. Under the original act there must be ten days' notice of an increase in rate and three days' notice of a decrease. Under the new act, however, the Commission may permit the period to be shortened, or modify any of the provisions for publishing, posting and filing.

5. The through route must be specified in the schedule and the consent of the connecting carriers obtained. This was ordered under the original act by the Commission, but the Supreme Court refused to require it. *Ante*, § 883.

6. Not only is variation from the published rates forbidden but the carrier is forbidden to carry goods or passengers until the rates are filed and published. This provision is especially important on account of the extent of the provisions of the act over pipe lines, express companies and sleeping-car companies.

TOPIC A—PUBLICATION OF SCHEDULE.

[See Chapter XX.]

§ 1013. What rates must be published.

All rates must be published, both for passengers and freight, and such as are offered under all circumstances; if for instance first class and second class rates are given for passengers both must be published, and so for freight carried in one way or another. Thus where passenger excursion rates are offered they must be published. Pittsburgh, C. & S. L. Ry. v. Baltimore & O. R. R., 2 Int. Com. Rep. 729, 3 I. C. C. 465 (1890). So the rates must be given as well on freight which is, as on that which is not, for export. New Orleans Cotton Exch. v. Louisville, N. O. & T. Ry., 3 Int. Com. Rep. 523 (1890).

§ 1014. Terminal and refrigerating charges.

The rate which carriers are required by the Act to Regulate Commerce, § 6, to publish, file, and adhere to without deviation, cover not merely the

carriage, but services rendered in receiving and delivering property as well. Phelps v. Texas & P. Ry., 4 Int. Com. Rep. 363, 6 I. C. C. Rep. 36 (1894). The schedule should state, among other terminal charges, the rules and regulations, if any, of the carrier in relation to storage. Pennsylvania Millers' State Assoc. v. Philadelphia & R. R. R., 8 I. C. C. Rep. 531 (1900); Blackman v. Southern Ry., 10 I. C. C. Rep. 352 (1904). If free storage facilities are allowed, the schedule should so state. American Warehousemen's Assoc. v. Illinois Central R. R., 7 Int. Com. Rep. 556 (1898). So when charges for refrigeration are applied in the transportation of perishable freight, such charges should be published and adhered to as all other charges for transportation are published and observed. Re Transportation of Fruit, 10 I. C. C. Rep. 360 (1904); Blackman v. Southern Ry., 10 I. C. C. Rep. 352 (1904); In re Charges for Transportation & Refrigeration, 11 I. C. C. Rep. 129 (1905).

§ 1015. Rules and regulations.

Rules or regulations in any wise changing, affecting, or determining any part of the aggregate of a carrier's rates, fares, or charges must be shown separately upon the posted schedules. Any such rules or regulations promulgated in circulars issued independently of such schedules are not lawfully in force. Suffern v. Indiana, D. & W. Ry., 7 I. C. C. Rep. 255 (1897). The rates charged for the diversion of cars must be published. American Warehousemen's Assoc. v. Illinois Central R. R., 7 I. C. C. Rep. 556 (1898).

If stop-over privileges are granted for any purpose, all the facts and circumstances connected therewith should be clearly stated in the published tariff, so that the public generally may enjoy their benefits. Mobile & O. Ry., In re Rates and Practices of, 9 I. C. C. Rep. 373 (1902). So where cotton is allowed a stop-off privilege for the purpose of grading and compressing, this forms part of the service covered by the rate, and should be specified in the published tariffs. Re Alleged Unlawful Rates, 8 I. C. C. Rep. 121 (1899). Treating the transportation of the log to the mill by one line, and the transportation of the lumber from the mill by another line, as a through shipment, involves the right to mill in transit; and when that privilege is granted, the tariff should show upon its face that the transportation covers carriage of the log to and the lumber from the mill; and the division allowed to the carrier of the log should be named in all cases. Central Yellow Pine Assoc. v. Vicksburg, S. & P. Ry., 10 Int. Com. Rep. 193 (1904). So rules prescribing maximum and minimum carload weights must be posted. Suffern v. Indiana, D. & W. Ry., 7 I. C. C. Rep. 255 (1897).

In Spillers v. Louisville & N. R. R., 8 Int. Com. Rep. 364 (1899), it appeared that defendant instructed its agents to disregard the regular published tariff rates and to charge a lower combination rate. It also had this rule of applying combination rates when less than tariff rates were in

force at other stations on its line. Instructions to that effect were issued in a separate printed circular, and did not appear, nor were they referred to in any way, upon its regular published tariffs. It was held that this practice is unlawful, and that, to be in compliance with the act, any rule which operates to alter, modify, or change established rates must be fully and clearly set forth upon the published tariffs of rates and charges to be affected thereby.

It would seem, however, that the carrier need not post such regulations as are usual and notorious. It was for instance held by the Supreme Court that the privilege of free cartage at a certain station, which had been openly and notoriously granted for many years and was well known to all who would have occasion to rely on it, need not be posted; though it might be within the power of the Commission to order such posting. Interstate Commerce Commission v. Detroit, G. H. & M. Ry., 167 U. S. 633, 17 Sup. Ct. 986 (1897).

§ 1016. Printing and keeping open to public inspection.

These provisions are not complied with by posting a notice stating that tariffs may be inspected upon application to the carrier's agent; Paxton Tie Co. v. Detroit S. R. R., 10 Int. Com. Rep. 422 (1905); even though the expedient is adopted because the schedules have been repeatedly torn down. Rea v. Mobile & O. Ry., 7 Int. Com. Rep. 43 (1897).

§ 1017. Posting in station.

Posting a notice in a station or depot that the tariff sheets of the railroad company may be found in some other place is not a compliance with this provision. Johnson v. Chicago, S. P., M. & O. Ry., 9 Int. Com. Rep. 221 (1902).

A rate may be an established one, so that an offence could be committed by charging less than the rate, even though the rate has not been posted as required by this section. United States v. Howell, 56 Fed. 21 (1892). Nor is the rate, when posted, such a matter of public knowledge that ordinary shippers can be charged with knowledge of it. Mobile & O. Ry. v. Dismukes (Ala.), 10 So. 289 (1891). But on the other hand, if the rate is duly published and called to the attention of shippers or consignees, they cannot depend for the lawful rate or charge upon what may be quoted by the carrier's agent, but must be guided by the published rate sheets themselves. Suffern v. Indiana, D. & W. Ry., 7 Int. Com. Rep. 255 (1897). Local rates when applied to interstate business must be published. Re Export Rates from Points East and West of Miss. River, 8 Int. Com. Rep. 185 (1899). See, also, as to posting the notices, Rea v. Mobile & O. Ry., 7 Int. Com. Rep. 43 (1897).

The publication of inland joint tariffs for the transportation of foreign

merchandise, and of advances and reductions, should be made by posting in a public place at the depot of the carrier where the freight is received in the port of entry, and also where it is delivered at the place of destination in the United States. New York Board of Trade & Transp. v. Pennsylvania R. R., 3 Int. Com. Rep. 417 (1890).

TOPIC B—VARIATION FROM SCHEDULE.

[See Chapter XXVIII.]

§ 1018. Any variation forbidden.

It is an unlawful practice for a carrier to disregard the regular published tariff rates, and charge a lower rate made up of a combination of the rate from the point of shipment to a competitive point, and from such competitive point to the station of destination, where the rule is not set forth in its published tariff. Spillers & Co. v. Louisville & N. R. R., 8 I. C. C. Rep. 364 (1899). In short, all rules or regulations which, if enforced, would result in changing or affecting rates or charges shown on the published schedules must be notified to the public for the time required by law for other rate changes. The notice should set forth the changes proposed to be made in the existing schedule, and such changes must be shown by printing new schedules, or plainly indicating it on the schedules in force. Suffern v. Indiana, D. & W. Ry., 7 I. C. C. Rep. 255 (1897). So a practice that grain may be shipped to an intermediate station and there forwarded as a new shipment at a proportional rate lower than the local rate from that point is a variation from the local published rate and therefore illegal. Re Rates and Practices of Mobile & O. Ry., 9 I. C. C. Rep. 373 (1903).

§ 1019. Devices to avoid the section.

A device to avoid the operation of this section will be futile. Thus, any device by which a published rate for carriage of coal from the mines of the carrier, which in the case of a favored consignee was made to include the price of the coal thus sold to the consignee by the carrier and delivered to him, is of course a violation of the Act. Re Transportation of Coal and Mine Supplies, 10 I. C. C. Rep. 473 (1904). And deliveries of coal by an interstate carrier not empowered to mine and market coal by its charter or by any legislation existing at the time of the adoption of the act to regulate commerce, under a contract to sell and transport such coal at a stipulated price, come within the requirement of that act respecting the maintenance of published rates, and its prohibitions against undue preferences and discrimination whenever, from any cause, the gross sum realized is insufficient to yield the carrier its published freight rates after deducting the purchase price of the coal and the cost of delivery, although the con-

tract may not have been open to that objection when made. New York, N. H. & H. R. R. v. Interstate Commerce Commission, 200 U. S. 361, 26 Sup. Ct. 272 (1906).

So where a railroad company (through a development company which it owned) bought grain in Kansas City, transported it to Chicago, and there sold it, the purpose being merely to transport it, and the varying profit on the transactions being the only real compensation for the carriage, this was held to be a departure from the published schedule and therefore illegal. In re Rates and Practices in the Transportation of Grain, 7 I. C. C. Rep. 33 (1897).

§ 1020. Rate wars.

Reduction of passenger rates without consent of connecting lines over which tickets are sold, and without filing schedules thereof with the Commission is violation of this section, and no necessity or compulsion is created by a war of rates which justifies disobedience of the statute. In re Passenger Tariffs and Rate Wars, 2 Int. Com. Rep. 340, 2 I. C. C. 513 (1889).

TOPIC C—FILING OF SCHEDULES AND AGREEMENTS.

[See Chapter XX.]

§ 1021. Purpose of the filing.

The purpose of the filing is to call the attention of the Commission to a proposed change in rates; and when a schedule is filed announcing an advance of general application, for which no apparent reason exists, such action is a proper subject of investigation, and if it thereupon appears that the advance is unwarranted, the Commission should use whatever power it has to correct the injustice. In the Matter of Proposed Advances in Freight Rates, 9 Int. Com. Rep. 382 (1903). The public purpose of the posting and filing of the schedules is insisted upon by the Commission.

"It is proper to add, however, that the requirement of publication found in the law is based upon many other considerations besides that of affording information to local shippers. The necessity of establishing and maintaining a steady, uniform, open tariff rate is of paramount importance, in view of the evils which the Act to regulate commerce attempts to correct, and obviously the first and most efficient method of regulation is the requirement of constant publicity." Re Atlanta & W. P. R. Co., 2 Int. Com. Rep. 480, 3 I. C. C. Rep. 75 (1889).

§ 1022. Presumption of legality.

The filing of schedules of rates with the Commission, as required by statute, raises no presumption as to the legality of such rates in any pro-

ceedings before the Commission. San Bernardino Bd. of Trade v. Atchison, T. & S. F. R. R., 3 Int. Com. Rep. 138 (1890). But, as has been seen, the result of the provisions of this section is that in all dealings between shipper and carrier, whether out of court or in court, except in a proceeding before the Commission to have the rates altered, the rate so filed with the Commission must be taken as the reasonable rate. Kinnavey v. Terminal R. R. Assoc., 81 Fed. 802 (1897); Van Patten v. Chicago, M. & S. P. Ry., 81 Fed. 545.

TOPIC D—JOINT TARIFFS AND SCHEDULES.

[See Chapter XIX.]

§ 1023. Meaning of joint tariff.

Two kinds or classes of routes are recognized and provided for, namely, the line of a single carrier, and a continuous line or route operated by more than one carrier, where the participating carriers establish joint rates or charges for such continuous line or route; and in respect of both classes of lines, the provision is uniform that established rates shall not be increased except after ten days' notice, nor reduced except after three days' notice. Joint through routes and rates are ordinarily the subject of agreement between the participating carriers; but when this is established, and until finally abrogated or changed, they are required by the statute to be kept open to public use. Consolidated Forwarding Co. v. Southern Pacific Co., 9 Int. Com. Rep. 182 (1902).

Joint tariffs, in the meaning of this section, are those established by agreement and mutual consent of the several carriers, as distinguished from the mere aggregate of the separate rates of the several carriers for transportation over their respective routes. The publication by a carrier subject to the Act to Regulate Commerce, of the aggregate local rates between points on its own line and those on the line of a connecting carrier with which it has no joint tariff, is not illegal; but it cannot lawfully add to the duly established rates of another carrier any amount it pleases less than its own rate, and publish and use that sum as a through rate, without the consent of the other company, as such a through rate is not a "joint rate," for joint rates can be made only by concurrence or assent; nor is it a combination rate, for one of its component parts has no legal existence or sanction as a separate or local charge; there must be lawful rates upon each of the roads before there can be a lawful combination of rates. New York, N. H. & H. R. R. v. Platt, 7 Int. Com. Rep. 323 (1897).

A combination rate, not being a joint rate, need not be posted, and is not subject to the act. Gulf, C. & S. F. Ry. v. Nelson (Tex. Civ. App.), 23 S. W. 732 (1893).

When rates established to apply between points within a single State are applied as part of combination rates on transportation between dif-

ferent States, such State rates, as well as the interstate rates with which they are combined, must be published at stations and filed with the Commission. Re Export Rates from Points East and West of Miss. River, 8 I. C. C. Rep. 185 (1899).

§ 1024. Making and filing.

Any one member of a joint combination may file copies of joint tariff for all the members. Re Filing Copies of Joint Tariff, 1 Int. Com. Rep. 76, 1 I. C. C. 225 (1887). And where one carrier files and properly publishes a joint tariff, he is not affected by the failure of other carriers properly to publish it. Virginia C. & I. Co. v. Louisville & N. R. R. (Va.), 37 S. E. 310 (1900). The tariffs need not be filed at a non-competing point. Chicago & N. W. Ry. v. Osborne, 52 Fed. 912 (1892).

A railway, stage route, and hotel association are not connecting carriers who can make and file a joint tariff. Wylie v. Northern Pac. R. R., 11 I. C. C. Rep. 145 (1905).

§ 1025. Whether routes must be published.

The Commission held that the published tariff should definitely name all the participating roads and indicate the various routes by which they undertake to afford transportation at designated rates. Theoretically, at least, it said, such a disclosure is necessary to a complete statutory joint tariff. And it was ordered that all carriers concerned should file an acceptance of the tariff. In re Form and Contents of Rate Schedules, 6 I. C. C. Rep. 267 (1894). But the Supreme Court of the United States finally held that the carrier publishing a through tariff might reserve the right to route the goods as it pleased beyond its own terminal. Southern Pacific Co. v. Interstate Commerce Commission, 200 U. S. 536, 26 Sup. Ct. 330 (1906).

§ 1026. Export rates.

Rates on export traffic must be published and filed in accordance with the provisions of this section. So-called through export rates, made by adding the ocean rate to the inland rail rates, are not analogous to railroad rates made by joint arrangement by railway carriers subject to the statute, in the sense that the total rate must be published and filed, and it is enough if the railroad carrier publishes and maintains its own rate to the seaboard; but if there is in fact such a joint arrangement that the rate is a joint rate under this section, then the entire through rate should be published, and not the inland division, which in that case might vary while the entire rate remained the same. Re Export & Domestic Rates on Grain, 8 Int. Com. Rep. 214 (1899); Kemble v. Boston & A. R. R., 8 Int. Com. Rep. 110 (1899); Re Publication & Filing of Tariffs, 10 Int. Com. Rep. 55 (1904).

TOPIC E—FORM OF SCHEDULES.

[See Chapter XVIII.]

§ 1027. Clearness of statement.

The publication of tariffs in convenient form, adequate in statement and properly authenticated, is essential to the enforcement of reasonable rates and impartial treatment. So far as possible the schedules should be simple in arrangement, ample in their disclosures, and free from ambiguity. Otherwise the opportunity is afforded for evading the law by discriminating practices and unjust exactions. Re Rate Schedules, 6 Int. Com. Rep. 267 (1894). The rate sheets must be readily intelligible to shippers and consignees. Johnston-Larimer D. G. Co. v. Atchison, T. & S. F. R. R., 6 Int. Com. Rep. 568 (1896). They must be so simplified that persons of ordinary comprehension can understand them; and a notation in the tariff of one carrier, making reference to the tariff of some competing carrier, does not meet the requirement of the law that the rate charged shall be published and filed. H. B. Pitts & Son v. St. Louis & S. F. Ry., 10 Int. Com. Rep. 684 (1905). The mere designation, in a paper or circular, of the means of arriving at rates by calculation or reference to other papers, does not constitute the rate sheet required; and the reissuing by a carrier of a tariff of another line, and, by a supplement concurrently issued, limiting its use of the rates therein prescribed to such as are over a specified minimum, is reprehensible. Colorado Fuel & I. Co. v. Southern P. Co., 6 Int. Com. Rep. 488 (1895).

§ 1028. Necessary fullness of statement.

The schedules should be sufficiently full to show all that a shipper needs to know. Thus published tariffs specifying rates per standard crate on vegetables shipped from Florida to northern or northeastern points should state plainly the dimensions of the crate to which the rates apply. Re Alleged Unlawful Charges for Transportation of Vegetables, 8 Int. Com. Rep. 585 (1900). On the other hand, where the rate sheet states that the rates are subject to an official classification filed with the Commission which specifically states in detail the rates under a form of bill of lading called uniform bill of lading, limiting the common-law liability and stating that rates on property not shipped subject to the conditions of the uniform bill are a specified percentage higher than the reduced rates under the uniform bill, the schedule was held sufficiently to inform shippers that the rates given were for carriage with limited liability. Mannheim Ins. Co. v. Erie & W. T. Co. (Minn.), 75 N. W. 602 (1898).

TOPIC F—ENFORCEMENT OF THE SECTION.

[See Chapter XX.]

§ 1029. Invalidity of the varied rate.

Under this section a contract for the transportation of an interstate shipment at less than the published rate approved by the interstate commerce commission is invalid; and the carrier may collect the rate as published, regardless of that fixed by the bill of lading. Southern Ry. Co. v. Harrison (Ala.), 24 So. 552 (1898). For the same reason the violation of such a contract furnishes no grounds for redress under the Act. Red Cloud Mining Co. v. Southern P. Co., 9 I. C. C. Rep. 216 (1902). And a shipper who is compelled to pay charges in excess of those set forth on the published rate schedules, because of rules prescribed by the railroad company in circulars as to maximum and minimum carload weights, is entitled to recover the same back from the company. Suffern v. Indiana, D. & W. Ry., 7 Int. Com. Rep. 255 (1897). See the similar decisions as to invalidity of rates under other sections of the act, *ante*, § 947.

CHAPTER XXXIII.

ORGANIZATION AND FUNCTIONS OF THE COMMISSION.

§ 1031. Provisions of the Statute.
1032. Amendments of 1906.

TOPIC A—ADMINISTRATIVE NATURE OF THE COMMISSION.

§ 1033. Nature of the commission.
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§ 1035. Investigation by commission.
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TOPIC C—POWER OVER RATES.

§ 1038. Early difference of opinion.
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§ 1031. Provisions of the statute.

Creation of Interstate Commerce Commission.—That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The commissioners first appointed under this Act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the commissioner

whom he shall succeed. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this Act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all the powers of the Commission. [Interstate Commerce Act, section 11.]

Authority of the Commission.—That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act. [Interstate Commerce Act, section 12.]

Salaries and expenses.—That each commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States.

The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties.

Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission. [Interstate Commerce Act, section 18.]

Office.—That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act. [Interstate Commerce Act, section 19.]

Reports of carriers to the Commission.—That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons,

and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the Commission, at its office in Washington, on or before the thirtieth day of September then next following unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided.

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

Any person who shall wilfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall will-

fully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence. [Interstate Commerce Act, section 20, as amended by Act of June 29, 1906, section 7.]

Enlargement of the Commission.—That a new section be added to said Act at the end thereof, to be numbered as section twenty-four, as follows:

"Sec. 24. That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners; one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. Not more than four commissioners shall be appointed from the same political party." [Act of June 29, 1906, section 8.]

§ 1032. Amendments of 1906.

Sections 12 and 19 of the original act are unchanged by the new legislation. Sections 11 and 18 are amended by an increase of the Commission from five to seven, and an increase of salary from seven thousand five hundred dollars to ten thousand dollars a year. This change is effected by new section 24.

The new form of section 20 gives the Commission additional power with regard to reports from all common carriers, subject to the law, and to prescribe the manner in which such reports shall be made and the subject-matter of the report, and provides a penalty for failure to obey such requirements. It also gives the Commission power, in its discretion, to prescribe the form of accounts, records, and memoranda to be kept by carriers, and that the Commission shall at all times have access to such records and books and other accounts to be kept. It provides penalties for the wrongful making of accounts or records or for destroying records or books

of accounts. It authorizes examinations to be made by experts appointed by the Commission, and imposes a penalty of fine of not more than $5,000 or imprisonment of not more than two years upon any examiner who divulges any knowledge that may come to him in the performance of his duties.

TOPIC A—ADMINISTRATIVE NATURE OF THE COMMISSION.

[See Chapter XLII.]

§ 1033. Nature of the Commission.

Under the Interstate Commerce clause of the Constitution Congress has the power to create a commission for the purpose of supervising, investigating, and reporting upon matters or complaints connected with or growing out of interstate commerce. Kentucky & I. Bridge Co. v. Louisville & N. R. R., 37 Fed. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351 (1889). By the acts of Congress creating the Commission, providing that it shall have an official seal and making it lawful for it to apply by petition for the enforcement of its orders, the Interstate Commerce Commission is made a body corporate with legal capacity to be a party plaintiff or defendant in the Federal courts. Texas & P. Ry. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666, 5 Int. Com. Rep. 405 (1896). The Interstate Commerce Commission is a special tribunal whose duties, though largely administrative, are sometimes semi-judicial; but it is not a court empowered to render judgments and enter decrees. Kentucky & I. Bridge Co. v. Louisville & N. R. R., *supra;* Toledo Produce Exchange v. Lake Shore & M. S. R. R., 3 Int. Com. Rep. 830 (1891).

§ 1034. Powers of Commission.

The Commission derives all its powers from the act, and it can exercise no powers not granted by the act. Thus it has no authority to administer the anti-trust law, or even to determine whether it has been violated. Sprigg v. Baltimore & O. R. R., 8 Int. Com. Rep. 443 (1900). Nor to enforce the provisions of a State Constitution. Railroad Commission of Kentucky v. Louisville & N. R. R., 10 Int. Com. Rep. 173 (1904). Or to investigate any action of a carrier committed prior to the time when the act went into effect. Holbrook v. St. Paul, M. & M. Ry., 1 Int. Com. Rep. 323 (1887); White v. Michigan Cent. R. R., 2 Int. Com. Rep. 641 (1889).

Thus the Commission has no power to enforce contracts, nor has it any general power to manage business of carriers. Traders & Travelers Union v. Phila. & R. R. R., 1 Int. Com. Rep. 371 (1887). So it has no authority to control commissioners of immigration, and cannot do so indirectly by inhibiting railroad companies from carrying out arrangements made by them with the commissioners. Savery v. New York C. & H. R. R., 2

Int. Com. Rep. 210 (1888). It has no power to grant redress for the failure of a carrier to comply with its common-law duty to furnish refrigerator cars. Re Transportation of Fruit, 10 Int. Com. Rep. 360 (1904). Or any particular equipment of cars, or in fact any cars at all. Scofield v. Lake Shore & M. S. R. R., 2 Int. Com. Rep. 67 (1888); Rice v. Cincinnati, W. & B. R. R., 3 Int. Com. Rep. 841 (1891). So the act does not confer upon the Commission authority to make an order affirmatively requiring a railway carrier to deliver carloads of interstate freight to a connecting carrier. Railroad Commission of Kentucky v. Louisville & N. R. R., 10 Int. Com. Rep. 173 (1904). Or to determine the right of milling in transit. Diamond Mills v. Boston & M. R. R., 9 Int. Com. Rep. 311 (1902). The Interstate Commerce Commission cannot inquire whether railroad companies act wisely or unwisely, fairly or unfairly, between themselves in making rates, forming lines, and establishing differentials; but its inquiry is limited to the question whether the situation created by the companies violates the Act to Regulate Commerce. New York Produce Exch. v. Baltimore & O. R. R., 7 Int. Com. Rep. 612 (1898).

TOPIC B— POWER TO INVESTIGATE AND MAKE ORDER.

[See Chapter XLI.]

§ 1035. Investigation by Commission.

On the other hand, the Commission may investigate any supposed violation of the act, even on its own motion. Re Atlanta & W. P. R. R., 2 Int. Com. Rep. 461 (1889); Re Grand Trunk Ry., 2 Int. Com. Rep. 496 (1889). It has authority to inquire into the management of the business of common carriers, and to require the attendance and testimony of witnesses, the production of books and papers, tariffs and contracts, relating to any matter under investigation; and to enforce its authority in this respect the Commission may invoke the aid of a court of the United States. Re Rates & Charges on Food Products, 3 Int. Com. Rep. 151 (1890). It may inquire as to division of alleged unlawful joint rate. Warren-Ehret Co. v. Central Ry. of New Jersey, 8 Int. Com. Rep. 598 (1900). Its jurisdiction extends to a case of alleged unlawful prejudice and disadvantage to shippers of outbound package freight through enforcement by carriers of a regulation providing for the earlier closing of depots used for the reception of such freight. Cincinnati Chamber of Commerce and Merchants' Exchange v. Baltimore & O. S. W. Ry., 10 Int. Com. Rep. 378 (1904).

The Act to Regulate Commerce applies to the transportation of export and import traffic, and the jurisdiction of the Commission over such traffic is not denied, but is distinctly affirmed and rather enlarged by the decision of the United States Supreme Court in Texas & P. R. Co. v. Interstate

Commerce Commission, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666, 5 Int. Com. Rep. 405. Re Export and Domestic Rates on Grain, 8 Int. Com. Rep. 214 (1899).

§ 1036. Report of Commission.

The report of the Commission should be framed after the manner of a Master's report to a Court of Chancery. It is not sufficient for the Commission in a report of its findings of fact and conclusions, to make statements in such a general way as not to disclose its view upon particular phases of the evidence, or its conclusions of law upon facts found with reference to the particular issues in the case, and make up the report of mere conclusions. In the case of Interstate Commerce Commission v. Louisville & N. R. R., 73 Fed. 410, 5 Int. Com. Rep. 656 (1896), Judge Clark said: "The procedure in a complaint before the Commission is prescribed in section 13 of the act, and by section 14 the Commission is required to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, and such findings so made are to be deemed *prima facie* evidence as to each and every fact found in any judicial proceeding thereafter had. The Commission is authorized to provide for the publication of its reports and decisions, and for the distribution thereof. Other sections of the act, not necessary to be set out herein, make it evident, in my opinion, that while the investigation and report of the Commission and its order thereon, as stated, do not constitute a judicial proceeding, still it was the intention of Congress that the procedure should substantially conform to that before a court charged with the duty of finding the facts, and giving judgment thereon, or to the investigation and report of a referee or special master in chancery, passing on both facts and law. Congress having provided for such investigation and report in general terms only, it is not to be doubted that substantial conformity to a judicial proceeding was contemplated. And the importance of the Commission's action, taking substantially the form of a judicial proceeding, is apparent when it is recognized that the Commission is composed of men of ability and experience, selected for this position with reference to their particular qualifications therefor, and whose entire time is devoted to questions arising under this act. This gives to the Commission's finding and opinion great weight, and entitles it to great consideration, both by the parties affected and by the courts, when called upon to enforce obedience to its mandates. For the Commission's investigation and opinion to have this intended value, however, it should, in fact, conform to the purpose of Congress in requiring such proceedings. It is not sufficient, therefore, in a report of its findings of fact and conclusions, to do so in such general way as not to disclose its views upon particular phases of the evidence, or its conclusions of law upon facts found with reference to the particular issues in the case. Stated in

another form, it is not sufficient for the report to be made up of mere conclusions. Its opinion or report should show what the issues in the case are, and what facts it finds in regard to such issues. The report should make suitable reference to the evidence adduced in regard to any particular question, where there is a conflict in the proof, showing how the Commission settles the disputed fact; or, if the evidence in regard to any issue is undisputed, state that fact. In other words, the report should give the parties to be affected, as well as the court, in any judicial proceeding afterwards instituted, definite and distinct information as to what was found as facts, and the Commission's opinion thereon, such as would be necessary to make a judicial opinion sufficient and satisfactory for the purpose of ordinary litigation. Now, the report of the Commission in this case does nothing of this kind. It was not intended to cast upon the courts the labor of an original and independent examination, as in a case instituted here in the first instance. If so, action by the Commission would be idle. The report should on all issues make a distinct showing, so that on its face it would be *prima facie* good as required under the act." See, also, Western N. Y. & P. R. R. v. Penn. Refining Co., 137 Fed. 343 (1905).

This is the principle on which the Commission proceeds; and it is its present practice to report its findings of fact separately from its conclusions. But neither before the above decision nor since does the Commission report cumulative evidence or mere details of evidence already embraced in substantial facts stated, upon which its findings are made. Riddle v. Pittsburg & L. E. R., 1 Int. Com. Rep. 773 (1888).

§ 1037. Opinion of Commission.

The Commission does not give opinions on abstract questions. Pennsylvania Co. v. Louisville, N. A. & C. R. R., 2 Int. Com. Rep. 603 (1889). So it will not construe the act before violation thereof is charged. Re Order of Railway Conductors, 1 Int. Com. Rep. 18 I, C. C. 8 (1887); Re Theatrical Rates, I Int. Com. Rep. 18 (1887); Re Inmates of Nat. Homes, I Int. Com. Rep. 73, 75 (1887); Boston & A. R. R. v. Boston & L. R. R., I Int. Com. Rep. 571 (1887). Nor will it express an opinion upon facts not brought before it by a petition within its jurisdiction. Re Iowa Barb Steel Wire Co., 1 Int. Com. Rep. 605 (1887); Re United States Commission of Fish and Fisheries, 1 Int. Com. Rep. 606 (1887). And it will not make rules as to free baggage until violation of act is charged. Re Order of Railway Conductors, Traders & Travelers Union v. Phila. & Reading R. R., 1 Int. Com. Rep. 18, 62, 315, 371 (1887).

TOPIC C—POWER OVER RATES.

[See Chapter XL.]

§ 1038. Early difference of opinion.

The Interstate Commerce Commission has no power under the Interstate Commerce Act to fix absolute or maximum rates. Cincinnati, N. O. & T. P. Ry. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700, 5 Int. Com. Rep. 391, B. & W. 424 (1896); Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry., 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896 (1897); Interstate Commerce Commission v. Alabama Midland Ry., 168 U. S. 144, 42 L. E. 414, 18 Sup. Ct. 145, B. & W. 433 (1897).

This question was vigorously discussed before its final settlement by the Supreme Court. The opinion of the federal courts was practically unanimous against the existence of the power. Interstate Commerce Commission v. Baltimore & O. R. R., 43 Fed. 37 (1888); Interstate Commerce Commission v. Lehigh Valley R. R., 5 Int. Com. Rep. 643 (1896); Interstate Commerce Commission v. Northwestern Ry., 5 Int. Com. Rep. 650 (1896); Interstate Commerce Commission v. Louisville & N. R. R., 5 Int. Com. Rep. 656 (1896); Interstate Commerce Commission v. Alabama Midland Ry., 5 Int. Com. Rep, 685 (1896).

§ 1039. Decision of the Supreme Court.

It was finally decided by the Supreme Court of the United States in Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry., 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896 (1897). Mr. Justice Brewer thus discussed the question:

"Before the passage of the act it was generally believed that there were great abuses in railroad management and railroad transportation, and the grave question which Congress had to consider was how those abuses should be corrected and what control should be taken of the business of such corporations. The present inquiry is limited to the question as to what it determined should be done with reference to the matter of rates. There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates, or it might commit to some subordinate tribunal this duty, or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power, and, if we examine the legislative and public history of the day, it is apparent that there was no serious thought of doing so.

"The question debated is whether it vested in the Commission the power and the duty to fix rates, and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used, and was so familiar to the legislative mind, and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication. Administrative control over railroads through boards or commissions was no new thing. It had been resorted to in England and in many of the States of this Union. In England, while control had been given in respect to discrimination and undue preferences, no power had been given to prescribe a tariff of rates. In this country the practice has been varying."

The learned judge then discussed the State acts, examined the terms of the Interstate Commerce Act, and reached these conclusions:

"We have therefore these considerations presented: First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative, and not an administrative or judicial, function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and, if Congress had intended to grant such a power to the Interstate Commerce Commission, it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third. Incorporating into a statute the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by implication carry to the Commission, or invest it with the power to exercise, the legislative function of prescribing rates which shall control in the future. Fourth. Beyond the inference which irresistibly follows from the omission to grant in express terms to the Commission this power of fixing rates is the clear language of section 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action—First, publication; and, second, the filing of the tariff with the Commission. The grant to the Commission of the power to prescribe the form of the schedules, and

to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the Commission.

"These considerations convince us that under the Interstate Commerce Act the Commission has no power to prescribe the tariff of rates which shall control in the future, and therefore cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed.

"But has the Commission no functions to perform in respect to the matter of rates, no power to make any inquiry in respect thereto? Unquestionably it has, and most important duties in respect to this matter. It is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And, with this knowledge, it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done, by rebate or any other device, to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right, which is the great purpose of the Interstate Commerce Act, shall be secured to all shippers. It must also see that that publicity which is required by section 6 is observed by the railroad companies. Holding the railroad companies to strict compliance with all these statutory provisions, and enforcing obedience to all these provisions, tends, as observed by Commissioner Cooley in Re Chicago, St. P. & K. C. Ry. Co., 2 Int. Com. Rep. 137, 2 I. C. C. 231, 261 (1888), to both reasonableness and equality of rate, as contemplated by the Interstate Commerce Act."

Under the amendments of 1906, the Commission is given the power to make rates. See Chapter xxxiv.

§ 1040. Indication of basis for proper rate.

But though it cannot prescribe rates, the Commission may after investigation find a particular rate to be unlawful, and prohibit the exaction of that rate, or find the time allowed for loading or unloading unlawful or, in other words, unreasonably small, and forbid the charging of demurrage at the expiration of that time and before the expiration of a reasonable time. Pennsylvania Millers' State Asso. v. Philadelphia & R. R., 8 Int. Com. Rep. 531 (1900). So it may require a carrier to desist from enforcing a classification of specified articles higher than the classification, which upon the facts is found to be lawful. This is not prescribing a rate for the future. Classification determines the relation of rates as between commodities, not the rate itself, and when a commodity

is transferred from a higher to a lower class, the revenues of the carrier are not necessarily diminished, since it may advance the rates applicable to those classes. Myer v. Cleveland, Cincinnati & St. L. Ry., 9 Int. Com. Rep. 78 (1901).

As a result of its inability to prescribe rates, the Interstate Commerce Commission may determine in respect to the past what was reasonable and just, but as to rates found to be unreasonable, unjust, and unlawful can make no provision or order for their reduction which the courts are required to enforce or the carrier obliged to obey, except to notify the carrier to cease and desist from violation of the statute. Cary v. Eureka Springs Ry., 7 Int. Com. Rep. 286 (1897). It cannot correct wrongs caused by improperly adjusted rates over independent lines from connecting cities to a common destination, as it is without authority to prescribe a maximum and minimum rate. Savannah Bureau of F. & T. v. Charleston & S. Ry., 7 Int. Com. Rep. 458 (1897). But where the Commission finds the existing rate to be unjust, it will indicate the basis on which the rate should be. Milwaukee Chamber of Commerce v. Chicago, M. & St. P. Ry., 7 Int. Com. Rep. 481 (1898); Daniels v. Chicago, R. I. & P. Ry., 6 Int. Com. Rep. 458 (1895).

CHAPTER XXXIV.

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§ 1041. Provisions of the statute.

Attendance of witnesses.—For the purposes of this Act the Commission shall have power to require, by supboena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing.

And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may in-

voke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question:

And any failure to obey such order of the court may be punished by such court as a contempt thereof.

The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation.

Such deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit or any clerk of a district or circuit court, or any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either parties, nor interested in the event of the proceeding or investigation.

Reasonable notice must first be given in writing by the

party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition.

Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify to the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission.

All depositions must be promptly filed with the Commission.

Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States. (Interstate Commerce Act, section 12, as amended by Act of Feb. 10, 1891.)

No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the Act of Congress, entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any

amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided,* That no person so testfying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of compentent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment. (Act of February 11, 1903.)

Complaint to the Commission. — Sec. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts;

Whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the com-

plainant only for the particular violation of law thus complained of.

If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Complaint to secure switch connection.—Any common carrier subject to the provisions of this Act, upon application of any lateral branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of

this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money. [Interstate Commerce Act, as amended by Act of June 29, 1906, section 1.]

Report of Commission. — That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports. [Interstate Commerce Act, section 14, as amended by Act of June 29, 1906, section 3.]

Fixing of maximum rate; order of Commission.—That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined

in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudical, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

Establishment of through routes and joint rates.—The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give

effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.

Allowance for services or instrumentalities of shipper.—If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act. [Interstate Commerce Act, section 15, as amended by Act of June 29, 1906, section 4.]

Reparation.—That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named . . . All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after.

Service of order.—Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy

thereof; and the registry mail receipt shall be prima facie evidence of the receipt of such order by the carrier in due course of mail.

Suspension or modification of order.—The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Obedience of carrier to order.—It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Schedules and reports to be public records.—The copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements, or arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this Act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals. [Interstate Commerce Act, section 16, as amended by Act of June 29, 1906, section 5.]

Rehearing. — That a new section be added to said Act immediately after section sixteen, to be numbered as section sixteen a, as follows:

Sec. 16a. That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therfor be made to appear. Applications for rehearing shall be governed by such general rules as the Com-

mission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order. [Act of June 29, 1906, section 6.]

Procedure of Commission.—That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commission shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney.

Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed.

Either of the members of the Commission may administer oaths and affirmations and sign subpoenas. [Interstate Com-

merce Act, section 17, as amended by Act of March 2, 1889, section 6.]

§ 1042. Amendments of 1906.

By the act of 1906 the action of the Commission has been fundamentally modified. Section 12, as to the attendance and examination of witnesses, as perfected by the act of February 11, 1893, is unchanged, as are sections 13 and 17. The important changes and new provisions are as follows:

1. By a new provision of the act any shipper who is aggrieved by the failure of a carrier to install and operate a switch connection with a lateral branch or private side track may complain to the Commission, which may investigate and make an order.

2. Section 14 of the act is amended by omitting the requirement that the Commission shall include in its reports its findings of fact, except such findings on which damages are awarded. The avowed object of this change was to save the Commission unnecessary labor. It tends to make the decisions of the Commission more like those of a court in form; and it may have an important effect on the action of the courts when applied to for an injunction against an order of the Commission. If the findings of fact are not stated, the facts will all go before the court, which may refuse an injunction upon its own view of the facts, without regard to the findings of the Commission. In fact, the position of the Commission, which has been similar to that of a Master in Chancery, will now be that of an independent quasi-judicial body.

3. By the amendment of section 15 the power of fixing a maximum rate is conferred on the Commission. This is not a power to initiate rates, but only to make an order after complaint and investgiation; nor is the rate named one which the carrier must adopt, but only a maximum above which it cannot go. The power is much less extensive than that conferred by the English act on the Board of Trade and Parliament.

4. By the same section the power is given to the Commission to establish through routes and joint rates, and to apportion the division of joint rates. This power is entirely new, though it has been given to the English Commission from the beginning (*ante*, § 890).

5. The Commission is to settle the allowance to be made by a carrier to a shipper for his services or for the use of his cars and other instrumentalities furnished to the carrier. Extravagant allowances of this sort have in the past given rise to much dissatisfaction (*ante*, § 884). The power is entirely new.

6. By amendments to section 16, several new provisions are introduced in relation to the procedure of the Commission; the section in its original form having covered only proceedings in the courts. A statute of limitations is provided for complaints to the Commission for the recovery of

damages; and provision is made for service of its orders, and for suspension and modification of them.

7. By a new provision, it is made the duty of a carrier to comply with the orders of the Commission so long as they are in effect. Under the original act the carrier could legally refuse to obey an order of the Commission taking the risk of a decision of the courts supporting the Commission.

8. The schedules and reports of carriers are made public records, *prima facie* evidence in judicial proceedings.

9. A new section is added, giving power to grant rehearings. The Commission has in fact from the first granted rehearings and this amendment codifies the practice.

TOPIC A—PROCEEDINGS ON ITS OWN MOTION.

§ 1043. Investigation by the Commission on its own motion.

The Commission, without complaint or petition of an individual may investigate on its own motion the charges or other practices of any carrier subject to its jurisdiction. In such a case, before entering upon the investigation, it will give notice of the time and place of taking testimony, and afford opportunity for calling and cross-examination of witnesses. Such proceeding is a substantial compliance with the statute. Re Rates and Charges on Food Products, 3 Int. Com. Rep. 151, 4 I. C. C. 116 (1890). Upon investigation if it thereupon appears that the conduct of the carrier is illegal, the Commission should use whatever power it has to correct the injustice. In the Matter of Proposed Advances in Freight Rates, 9 I. C. C. Rep. 382 (1903).

§ 1044. Investigation by order of Congress.

Such an investigation was instituted in 1890 as a result of a resolution of the Senate and a complaint of the Department of Agriculture. The Commission held that its authority in this case was derived from the permission given in the statute to proceed on its own motion. "Neither the Senate nor the Department of Agriculture is authorized to make any complaint, which under the statute the Commission is required to investigate. The complaint so made and repeated through the Senate and Agricultural Department was not a form of legal process, but an expression of discontent and dissatisfaction with existing rates. It imposed no duty, conferred no power. It was an admonition suggesting too much forbearance if not an omission of duty in respect to rates. As such it showed that the Commission did not of its own motion without probable good cause institute this inquiry and begin the investigation under the statute." Re Rates and Charges on Food Products, 3 Int. Com. Rep. 151, 4 I. C. C. 116 (1890).

§ 1045. Investigation as result of filing new tariff.

A similar investigation was ordered by the Commission upon the filing of tariffs by the trunk lines showing a general increase of freight rates. The circumstances are thus stated by Mr. Commissioner Prouty: "During the last of November, 1902, tariffs were filed with the Commission giving notice of advances in rates of general application. About the same time, owing largely to published interviews of railway traffic officials, the impression grew up that other general advances were to be made. This was widely commented upon by the press, and was the subject of considerable informal complaint to us. Any general advance in transportation charges is a matter of great public concern, and it seemed especially appropriate that the Commission, in the discharge of its duty to keep informed touching the methods and practices of railway carriers subject to the act to regulate commerce should ascertain the reason for these advances. An order was accordingly entered on December 1st respecting rates upon grain and grain products, dressed meats and provisions from the Mississippi river to the Atlantic seaboard, by which the leading lines of railway engaging in this traffic were required to appear at Washington on December 16th for the purpose of giving information touching the advances which had been made or were contemplated in these rates." After a full investigation the Commission stated its conclusion; but since such general investigation of proposed advances in freight charges was in a manner *ex parte*, although the respondent carriers were fully heard through their traffic representatives, and in some instances through their attorneys, and since facts not brought out in the inquiry, with further discussion of the subject, might lead to a different conclusion, no order was made. It was, however, determined that, unless the rates be readjusted in accordance with the views expressed by the Commission, proceedings would be begun against the several lines, which would put directly in issue the rates involved. In the Matter of Proposed Advances in Freight Rates, 9 Int. Com. Rep. 382 (1903).

§ 1046. Procedure upon such investigation.

Such investigation cannot be instituted by petition, since there is no petitioner; but it must be begun by some notice to the carrier investigated of the subject of inquiry. An investigation of this sort having been undertaken, counsel for the carriers attacked the jurisdiction of the Commission on the ground that "the proceeding was not commenced and conducted in accordance with the Rules of Practice established by the Commission, and was therefore without authority of law." The Commission, however, held the procedure regular, saying: "The act provides 'that the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice,' and

'may from time to time make or amend such general rules or orders as may be requisite for the order and regulation of business before it.' The Rules of Practice or orders which have been made in accordance with these provisions of the act refer to proceedings commenced by parties authorized to complain and apply to the Commission by petition. Such rules or orders have no application to proceedings instituted by the Commission on its own motion. These are commenced and conducted under the statute. The law requires the party complaining of anything done or omitted to be done by any common carrier to apply to the Commission by petition which shall briefly state the facts, and the rules made by the Commission for the regulation of its proceedings require the petition to be verified. If the statute requires the two proceedings, or the method of commencing the two proceedings provided for in section 13 of the act, to be commenced in the same way, then the Commission to institute inquiry on its own motion must present a petition to itself; and, if the course of procedure or Rules of Practice prescribed by the Commission apply to the investigations and proceedings commenced by the Commission on its own motion as well as to those not so commenced, then the Commission must not only petition to itself, but must itself verify such petition. In the matter under consideration the Commission or some member of it would first make oath to the facts showing the rates to be unreasonable, then proceed with the investigation to ascertain if the verification was true and whether the rates were or were not unreasonable. Such is not believed to be the method provided by the act or the rules of the Commission for attaining the 'ends of justice.'

"The Commission is authorized to institute inquiry on its own motion and in such inquiry 'to investigate the matter in question.' It has so determined when it has entered upon the investigation of such matters; and it may prosecute any inquiry necessary to such investigation by one or more of the Commissioners in any part of the United States. In any investigation the party to be affected must have notice. In any such matter as that we are now considering the party to be affected must have notice of what such party has done or omitted to do and which is challenged and which it is proposed to investigate. The notice given to the several companies named elsewhere in this proceeding was sufficient for this purpose and sufficient in law." Re Rates and Charges on Food Products, 3 Int. Com. Rep. 151, 4 I. C. C. 116 (1890).

TOPIC B—PROCEEDINGS ON COMPLAINT.

[See Appendix of Forms.]

§ 1047. Procedure.

The practice and procedure of the Commission is as simple as possible, consistent with justice; and it desires that without dilatory motions,

pleas in abatement or other interlocutory proceedings, the matter in question may be brought to an issue at the earliest practicable day when a final hearing may be had forthwith, and all proper questions will then be entertained, whether jurisdictional or going to the merits of the controversy. So in a case where the defendant moved to dismiss the petition for lack of jurisdiction, the Commission declined to take up the motion, because the object of the motion was to reach the merits of the case and have them discussed and passed upon summarily, instead of at the customary final hearing. A practice thus to anticipate by motion the final hearing the Commission did not think advisable and would not therefore favor. Associated Wholesale Grocers v. Missouri Pac. R. R., 1 Int. Com. Rep. 321, 1 I. C. C. 156 (1887).

In accordance with this view, the Commission desires counsel to simplify the issues so far as possible by agreeing upon the facts. This was expressed by the first chairman, Judge Cooley, in a letter in connection with a petition of the Boards of Trade Union of Minnesota. 1 Int. Com. Rep. 446 (1887). He wrote that in nearly every case "the major portion of the facts are not in dispute at all, and as to all such facts we are compelled to insist that counsel shall stipulate them in advance. We have more difficulty with this matter than with any other, counsel holding themselves aloof from each other, not trying to agree or not half trying, and then coming forward expecting to take time indefinitely in making proof of facts which are really not contested. If we had an indefinite amount of time at our disposal, they might be indulged; but as the case actually is, unnecessary indulgence to some is equivalent to denial of rights to others awaiting a hearing.

"In the Boards of Trade Union case, the facts must be largely matters of public notoriety, and it would be altogether wrong to calculate upon taking up time to prove them by oral evidence. An agreement upon them should be all ready before we take up the case. Of couse it would not be expected parties should agree upon the consequences flowing from the facts, but even as to these it is not generally necessary to go into proof as in a suit at law, for the Commission will apply its own judgment where all that is requisite in an application of ordinary common sense, and will not require or expect that evidence be adduced to show that usual results have followed."

§ 1048. Parties given opportunity to be heard.

Proceedings on complaint of a party take the form of judicial proceedings. Thus a reasonable opportunity will be given for the parties to be heard. Business Men's Assoc. v. Chicago & N. W. Ry., 2 Int. Com. Rep. 48, 2 I. C. C. 52 (1888). So where a railroad submits a shipper's claim for carload rating on a mixed carload to the Commission, it will be treated

as a complaint and answer, and the cause will proceed judicially. Roth v. Texas & P. Ry., 9 I. C. C. Rep. 602 (1902).

§ 1049. Place of hearing.

The Commission may hear cases either in Washington or in some other convenient place. A case involving local rates was ordered to be heard before the Interstate Commerce Commission at a central point in the territory immediately affected by the rates. Delaware State Grange v. New York, P. & N. R. R., 2 Int. Com. Rep. 187, 2 I. C. C. 309 (1888).

If the petition is not specific, though plainly sufficient to constitute the basis for an award of damages, the defendants are entitled, before the hearing, to a specification showing in detail the amounts for which recovery is sought. Cattle Raisers' Assoc. v. Chicago, B. & Q. R. R., 10 I. C. C. Rep. 83 (1904).

§ 1050. Pleadings.

The complaint must be presented in a verified petition. Re Southern Pac. R. R., I Int. Com. Rep. 16, 1 I. C. C. 6 (1887). The complainant will be bound by the form of his complaint. So when a carrier on complaint under the Act to Regulate Commerce, § 4, avers substantial dissimilarity in circumstances and conditions as justifying its greater charge for shorter hauls, it is concluded by its pleading, and must affirmatively show that the circumstances and conditions, of which it is entitled to judge in the first instance, are in fact substantially dissimilar; but upon an application for relief under the § 4 proviso the carrier is not limited by such a rule of evidence, and may present to the Commission every material reason for an order in its favor. Trammell v. Clyde Steamship Co., 4 Int. Com. Rep. 120, 5 I. C. C. 324 (1892).

An answer which sets up a justification must clearly advise complainants of the facts and circumstances relied on as constituting such justification. Raworth v. Northern P. R. R., 3 Int. Com. Rep. 857, 5 I. C. C. 234 (1892).

Under the rules of practice issued by the Commission, a replication to an answer is not required or allowed. Oregon S. L. Ry. v. Northern P. R. R., 2 Int. Com. Rep. 639, 3 I. C. C. 264 (1889). Matter which is not expressly in issue by the pleadings or necessarily involved in issues presented in a strictly *inter partes* case instituted by complaint before the Interstate Commerce Commission cannot be authoritatively determined by it. Commercial Club v. Chicago, R. I. & P. R. R., 6 Int. Com. Rep. 647 (1896).

The Interstate Commerce Commission is liberal in allowing amendments to complaints, but will not allow one that would be in effect making a new case. Delaware State Grange v. New York, P. & N. R. R., 2 Int. Com.

Rep. 187, 2 I. C. C. 309 (1888); Riddle v. Baltimore & O. R. R., 1 Int. Com. Rep. 701, I. C. C. 372 (1888). A complaint against a railroad company stating that it had been previously in the hands of a receiver who was now president, was allowed to be amended so as to show existence of receivership which it appeared on hearing was still in existence. Reynolds v. Western New York & P. Ry., 1 Int. Com. Rep. 685, 1 I. C. C. 347 (1887).

TOPIC C—PROPER PARTIES.

§ 1051. Person interested as complainant.

Only a person interested in his own right can file a complaint. Thus a coal operator not being damaged by the failure of a railroad company to establish a rate upon a class of coal not produced at his mine, cannot complain of such a rate. McGrew v. Missouri Pac. R. R., 8 I. C. C. Rep. 630 (1901). The person aggrieved should complain in his own name; a complaint by a ticket broker having no interest in the transaction will not be entertained. Ottinger v. Southern Pac. R. R., 1 I. C. C. Rep. 607 (1887).

But the interest of the petitioner, by the provision of the act, need not be direct; therefore the defendants are not entitled to a dismissal of a complaint of unlawful rates, on the ground that the petitioners, being merely commission merchants, can sustain no direct or material damage under the rates in question. James v. Canadian P. R. R., 4 Int. Com. Rep. 274, 5 I. C. C. 612 (1893); Milk Producers' Protective Assoc. v. Delaware, L. & W. Ry., 7 I. C. C. Rep. 92 (1897); Central Y. P. Assoc. v. Vicksburg, S. & P. R. R., 10 I. C. C. Rep. 193 (1904).

§ 1052. Complaint by association.

A corporation whose object is to promote the marketing of live stock at Chicago in the interest of its members may, under the Act to Regulate Commerce, § 13, maintain a proceeding to correct an unreasonable freight rate on live stock shipped to Chicago, as its members, for whose general benefit and protection it was formed, have a vital interest in such a proceeding. Cattle Raisers' Assoc. v. Fort Worth & D. C. R. R., 7 I. C. C. Rep. 513 (1897); Chicago Live Stock Exchange v. Chicago G. W. R. R., 10 I. C. C. Rep. 428 (1905). So a Milk Producers' Association, whether representing its own members, or specially authorized to represent other shippers, or assuming in addition to represent shippers engaged in the same industry on some of the defendant lines, was entitled to bring and maintain this proceeding, affecting rates on milk supplied for a common market, against all the defendants engaged in carrying for that market. A defendant carrier is not entitled to have a complaint dismissed as to it "because of the absence of direct damage to the complainant," and it is the duty of the Commission, under express direction in the act, to "exe-

cute and enforce" the provisions of the statute. Milk Producers' Protective Assoc. v. Delaware, L. & W. R. R., 7 I. C. C. Rep. 92 (1897). And while an association of shippers has no direct interest in the determination of the question as to whether divisions or allowances from published tariff rates, made by defendants to tap lines owned or controlled by other shippers, constitute departures from the published rates, it has such an indirect interest as entitles it, under the statute, to maintain a proceeding to have such division declared unlawful. Central Yellow Pine Assoc. v. Vicksburg, S. & P. R. R., 10 I. C. C. Rep. 193 (1904). If the complaint is brought in the name of the association, it seems that in a proper case reparation may be ordered to individual members; but the better practice, in view of the unsettled state of the law in this respect, and in order that all phases of the question may be presented to the court, is for the members of the association seeking damages to file claims in the nature of intervening petitions. When such a petition is filed, it is considered the beginning of the action in all its subsequent stages; consequently the suit of the members of a cattle raisers' association for the recovery of damages should be treated as having been begun by the filing on their behalf of the original petition by the association itself, although they subsequently intervened. Cattle Raisers' Assoc. v. Chicago, B. & Q. R. R., 10 I. C. C. Rep. 83 (1904).

§ 1053. Board of trade.

In the case of Texas & Pacific Ry. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666, 5 Int. Com. Rep. 405 (1896), the complaint was originally made "by certain corporations of New York, Philadelphia and San Francisco, known as boards of trade, or chambers of commerce, which appear to be composed of merchants and traders in those cities, engaged in the business of reaching and supplying the consumers of the United States with imported luxuries, necessities, and manufactured goods generally, and as active competitors with the merchants at Boston, Montreal, Philadelphia, New Orleans, San Francisco, Chicago, and merchants in foreign countries who import direct on through bills of lading issued abroad." The defendants argued that the complaint was not legally made. The Commission and, subsequently the courts, held that the complaint might be entertained. In the Supreme Court Mr. Justice Shiras said: "We shall assume, in the disposition of the present case, that a valid complaint may be made before the Commission, by such trade organizations, based on a mode or manner of treating import traffic by a defendant company, without disclosing or containing charges of specific acts of discrimination or undue preference, resulting in loss or damage to individual persons, corporations, or associations. We do not wish to be understood as implying that it would be competent for the Commis-

sion, without a complaint made before it, and without a hearing, to subject common carriers to penalties."

§ 1054. State Railroad Commission.

The repeal of the law creating the railroad commission of Florida does not operate as a withdrawal or dismissal of a complaint brought in its name before the Interstate Commerce Commission for the real parties in interest. Railroad Commission of Florida v. Savannah, F. & W. R. R., 3 Int. Com. Rep. 688, 5 I. C. C. 136 (1891).

§ 1055. Complainant not coming with clean hands.

The defendant has sometimes objected to the maintenance of the complaint on the ground that the complainant did not come before the Commission with clean hands. Thus in the case of the Interstate Commerce Commission v. Southern Pacific Company, 132 Fed. 829 (1904), there was involved an order of the Commission forbidding the enforcement by defendants therein of a rule whereby they reserved to themselves, as initial carriers, the right of routing citrus traffic beyond their own lines and denied this privilege to shippers. The defendants contended that, even if the rule was unlawful, the complainants (shippers) were not entitled to relief, because they had used the privilege of routing for the purpose of securing rebates and desired to retain it for that purpose. In overruling this contention the court said: "With reference to defendants' contention, that the complainants before the Interstate Commerce Commission were there with unclean hands, it is only necessary to say, that, in this court, the Commission represents the public at large and therefore no participation by said complainants in the unlawful practice of rebates could bar relief."

A similar objection was made in the case of Tift v. Southern Railroad, 10 I. C. C. Rep. 548 (1905). The complainants were members of an association which, it was claimed, constituted an illegal monopoly. The Commission held that this fact was immaterial. Mr. Commissioner Clements said: "A proceeding like the present before this Commission, although instituted by and in the name of parties complaining of injury to themselves from alleged violations of law, is not a strictly private or personal suit into which a party complainant must enter with 'clean hands,' but is a proceeding for the enforcement of a public duty as well as of an individual or private right.

"The act to regulate commerce provides that this Commission 'may institute an inquiry of its own motion' into a matter of the kind involved in this case 'in the same manner and to the same effect as though complaint had been made,' and that, where complaint is made, such complaint shall not, 'at any time be dismissed because of the absence of direct

damage to complainants.' In these cases, therefore, the complaint is in the nature of an information and the complainants occupy, in part, at least, the attitude of informers." After citing the decision of the Circuit Court just examined, he continued: "The same principle applies in a case like the present before this Commission. The complainants represent 'the public at large' as well as themselves. The public interested includes consignees, consumers and others, as well as shippers and producers or manufacturers." And see to the same effect Chicago Live Stock Exchange v. Chicago G. W. R. R., 10 I. C. C. Rep. 428 (1905).

A fortiori the fact that others associated with the complainants are acting illegally will not affect the validity of the complaint. Thus the fact that the members of a corporation organized to promote the marketing of live stock at a given city are violating the anti-trust law will not prevent the corporation from maintaining a proceeding to correct an unreasonable freight rate on live stock shipped to such city. Cattle Raisers' Assoc. v. Fort Worth & D. C. R. R., 7 I. C. C. Rep. 513 (1900). So the fact that a certain association constitutes an illegal monopoly will not affect the right of certain members of the association, constituting but a portion of its membership, to complain. Tift v. Southern R. R., 10 I. C. C. Rep. 548 (1905).

§ 1056. Proper parties defendant.

Where a through rate is in question, all the carriers participating in the rate are proper parties, and may be joined as defendants. Warren-Ehret Co. v. Central R. R., 8 I. C. C. Rep. 598 (1900); Cattle Raisers' Assoc. v. Chicago, B. & Q. R. R., 10 I. C. C. Rep. 83 (1904); Texas & P. R. R. v. Interstate Commerce Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; 5 Int. Com. Rep. 405 (1896).

§ 1057. Necessary parties defendant.

All carriers whose appearance is necessary to settle the controversy must of course be present. Riddle v. Pittsburgh & L. E. R. R., 1 Int. Com. Rep. 773, 1 I. C. C. 490 (1888); Michigan Congress Water Co. v. Chicago & G. T. R. R., 2 Int. Com. Rep. 428, 2 I. C. C. 594 (1889). And no carrier can be affected by the order of the Commission unless he was a party to the proceeding. Poughkeepsie Iron Co. v. New York C. & H. R. R. R., 3 Int. Com. Rep. 248, 4 I. C. C. 195 (1890). The reason for securing the appearance of all interested carriers is clear. The reasonableness of rates cannot be fairly determined in a proceeding to which some of the parties responsible for such rates are not parties. New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. R., 2 Int. Com. Rep. 289, 2 I. C. C. 375 (1888); Michigan Congress Water Co. v. Chicago & G. T. R. R., 2 Int.

Com. Rep. 428, 2 I. C. C. 594 (1889); Kentucky & I. Bridge Co. v. Louisville & N. R. R., 2 Int. Com. Rep. 102, 2 I. C. C. 162 (1888).

"When complainants desire to test the justice or legality of the through rates from Frankfort to New York, the necessity of bringing in the parties who make the rates, not for forty-six miles merely but for the whole distance, is obvious. They must be brought in, first, because they have a right to be heard, and second, because an order made and purporting to control their action when they were not parties would be improper on its face, and in a legal sense ineffectual. If such an order could have any effect as against the initial road, it would only be to prevent its agents naming to shippers when they called for it an aggregate through rate; it would not prevent its making the same rate as now to South Wanatah, nor preclude the connecting road from making rates independently from South Wanatah eastward." Allen v. Louisville N. A. & C. R. R., 1 Int. Com. Rep. 621, I I. C. C. 199 (1887).

So where a leased road is made the party defendant, the operating road should be added as a party. Boyer v. Chesapeake, O. & S. W. Ry., 7 I. C. C. Rep. 55 (1897).

§ 1058. Supervening receivership.

The fact of a receivership for a defendant carrier subsequent to complaint should not interfere with the progress of a proceeding brought merely for the purpose of railway regulation. Trammell v. Clyde Steamship Co., 4 Int. Com. Rep. 120, 5 I. C. C. 324 (1892). Or for violations of the act in general. Troy Board of Trade v. Alabama Midland Ry., 4 Int. Com. Rep. 348, 6 I. C. C. 1 (1894).

§ 1059. One of several joint parties.

But it is not necessary that all carriers should be joined as defendants who would be proper parties to the proceedings. Thus where a complaint is made of rates fixed by an association of carriers, it is not necessary to join all the carriers in the association; the one carrier against which the particular complaint is directed may be the only defendant. Page v. Delaware, L. & W. R. R., 6 I. C. C. Rep. 548 (1896). But see Minneapolis Chamber of Commerce v. Great Northern Ry., 4 Int. Com. Rep. 230, 5 I. C. C. 571 (1892). So a railroad company which participated in through rates is not a necessary, even if it is a proper, party to a proceeding by the Interstate Commerce Commission against another company for disobedience of an order of the Commission in the matter of such rates. Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666, 5 Int. Com. Rep. 405 (1896). And one or more of several connecting carriers need not be made parties to a proceeding before the Interstate Commerce Commission against another connecting carrier for

unlawful discrimination in rates between places wholly on its own line as compared with the through rate over the connecting lines. Daniels v. Chicago, R. I. & P. R. R., 458, 6 I. C. C. Rep. 458 (1895). See to the same effect Independent Relief Assoc. v. Western N. Y. & P. R. R., 6 I. C. C. Rep. 378 (1895). So where one railroad company owns a controlling interest in a subsidiary company while service of complaint on the controlling company may not be legal service upon a subsidiary company, it does in fact, for all practical purposes, inform the other company of the proceedings. Mayor and City Council of Wichita v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 534 (1903).

But it is sometimes inconvenient to get all the carriers before the Commission at the same time; and a hearing of a complaint against one of a number of connecting carriers may be the only practical thing. So in an early proceeding to correct a classification by the initial carrier of freight which, before reaching its destination, must pass over the roads of several carriers, it was stated by the Commission that all such carriers should be made parties; yet where the initial carrier alone is made defendant, it was held that the proceeding was not therefore defective. Hurlburt v. Lake Shore & M. S. R. R., 2 Int. Com. Rep. 81, 2 I. C. C. 122 (1888). In a case soon after decided the Commission in a similar case said that an order might issue against the respondents, and the cause be held for the purpose of bringing such other carriers into it to be proceeded against unless they comply with the order. Bates v. Pennsylvania R. R., 2 Int. Com. Rep. 715, 3 I. C. C. 435 (1889). And this procedure is now well settled. Thus while a railroad company operating its road as part of a through line in connection with other carriers, defendants in a case brought to test the legality of a through charge over such line, is a proper party, it is not a necessary party to the proceeding. Warren-Ehret Co. v. Central R. R., 8 I. C. C. Rep. 598 (1900); and in proceedings to determine the reasonableness of a through rate as augmented by an alleged unlawful terminal charge, all the carriers participating in the through rate are not necessary parties; the only necessary parties defendant, are the carriers who retain the terminal charge for their own use. Cattle Raisers' Assoc. v. Chicago, B. & Q. R. R., 10 I. C. C. Rep. 83 (1904).

§ 1060. Parties must have an interest.

Only persons having some legal interest in the controversy can be joined as parties defendant. For this reason the receiver of a railroad company is not, after his discharge, either a proper or necessary party defendant to an action for a rebate of freight under a contract made by him. He is not personally liable on contracts officially made by him; and his official connection with the controversy having ceased he is not interested. Bayles v. Kansas Pacific R. R., 13 Colo. 181, 2 Int. Com. Rep. 643 (1889).

§ 1061. Intervening parties.

It is not necessary for a carrier to be made a party defendant in order to secure a hearing before the Commission; all persons having an interest in a question pending before the Commission may appear when the case is submitted, without being made formal parties. Hurlburt v. Lake Shore & M. S. R. R., 2 Int. Com. Rep. 81, 2 I. C. C. 122 (1888).

TOPIC D—ORDER OF PROCEDURE.

[See Rules in Appendix.]

§ 1062. Default.

The petition will be dismissed if the complainant fails to appear at the hearing. Jackson v. St. Louis, A. & T. Ry., 1 Int. Com. Rep. 599 (1887); or if he admits the legality of the defendant's acts. Re Export Trade of Boston, 1 Int. Com. Rep. 25, 1 I. C. C. 24 (1897); or totally fails to produce any evidence to prove the issue. Holbrook v. St. Paul, M. & M. R. R., 1 Int. Com. Rep. 323, 1 I. C. C. 102 (1887); Leonard v. Union Pacific Ry., 1 Int. Com. Rep. 627 (1887); Rice v. Louisville & N. R. R., 1 Int. Com. Rep. 722 (1888).

§ 1063. Stay of proceedings.

The Commission may in a proper case stay the proceedings and hold the case open until a future time. So where a similar case had been heard by the Commission and an order made and a petition to enforce the order was pending in the courts, the present case was stayed until final determination of the petition in the courts. Southern Paint & G. Co. v. Lake Erie & W. R. R., 6 I. C. C. Rep. 284 (1894). And so where it seemed best the Commission having indicated its view of the question, recommended the carriers concerned to amend their tariffs in accordance with the opinion to expressed, and meanwhile held the case open for future application of the parties. Paine Bros. & Co. v. Lehigh Valley R. R., 7 I. C. C. Rep. 218 (1897); and see Rea v. Mobile & O. R. R., 7 I. C. C. Rep. 43 (1897).

§ 1064. Continuance for settlement.

Where a carrier at the hearing agrees to conform to the desires of the Commission, no order will be made at the time, but the case will be continued to give the carrier an opportunity to remove the cause of complaint. Hot Springs v. Western N. C. R. R., 1 Int. Com. Rep. 316 (1887); Holbrook v. St. Paul, M. & M. Ry., 1 Int. Com. Rep. 323, 1 I. C. C. 102 (1887); Re Alleged Unlawful Transportation Charges, 6 I. C. C. Rep. 624 (1896).

TOPIC E—EVIDENCE AND BURDEN OF PROOF.

[See Appendix.]

§ 1065. Testimony on both sides should be introduced.

It is not proper for railroad companies to withhold the larger part of their evidence from the Interstate Commerce Commission, and first adduce it in the Circuit Court in proceedings by the Commission to enforce its order; but the purposes of the act of Congress to regulate commerce call for a full inquiry by the Commission in the first instance. "The Commission is an administrative board, and the courts are only to be resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the Commission have been disregarded. The theory of the act evidently is, as shown by the provision that the findings of the Commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the Commission. We do not mean, of course that either party, in a trial in the court, is to be restricted to the evidence that was before the Commission, but that the purposes of the act call for a full inquiry by the Commission into all the circumstances and conditions pertinent to the questions involved." Shiras, J., in Cincinnati, N. O. & T. P. R. R. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700, 5 Int. Com. Rep. 391 (1896). See Spartanburg Board of Trade v. Richmond & D. R. R., 2 Int. Com. Rep. 193, 2 I. C. C. 304 (1888).

§ 1066. Acts of Commission need not be proved.

Contracts and tariffs filed with the Commission under the Act to Regulate Commerce, § 6, may be considered, although not specifically introduced in evidence on the hearing. Boston Fruit & P. Exch. v. New York & N. E. R. R., 3 Int. Com. Rep. 493, 4 I. C. C. 664 (1891); and see Re Rates and Charges on Food Products, 3 Int. Com. Rep. 151, 155, 4 I. C. C. 116 (1890).

§ 1067. Rules of evidence.

The ordinary rules of evidence are enforced in proceedings before the Commission. Thus the rule as to parol evidence appears to be enforced. So terms of art, or terms peculiar to any occupation or business, used in a classification sheet to designate the product of a particular employment, are supposed to be understood in that employment; and it is not competent for railroad experts, when the meaning of the classification is questioned, to testify in what sense they are understood in classification circles. Hurlburt v. Lake Shore & M. S. R. R., 2 Int. Com. Rep. 81, 2 I. C. C. 122 (1888).

On the same general principle, unauthorized declarations of a depot agent, implying that a tank car which has returned from one long journey

is in a safe condition to be loaded and started on another long run, are not binding upon the railway company. Michigan Congress Water Co. v. Chicago & G. T. R. R., 2 Int. Com. Rep. 428, 2 I. C. C. 594 (1889).

§ 1068. Privilege against self-crimination.

A witness is protected by the constitutional provision from being compelled to disclose the circumstances of his offense, or the sources from which or the means by which evidence of its commission, or of his connection with it, may be obtained or made effectual for his conviction. A statutory enactment must afford absolute immunity against future prosecution for the offense to which a criminating question relates, in order to supplant the constitutional privilege of a person to refuse to be a witness against himself; and the provision of United States Revised Statutes, § 860, that the evidence of a person shall not be used against him in any proceeding for a crime or penalty or forfeiture, does not take away the constitutional privilege of a person that he shall not be compelled in any criminal case to be a witness against himself. So in an investigation by a grand jury of alleged violations of the Act of Congress to Regulate Commerce of February 4, 1887, against a railway company, a person engaged in commission business is privileged, under U. S. Const. 5th amend., from answering as a witness as to whether he had obtained a rate of transportation of grain on any railroad coming from a point outside of the State, less than the tariff or open rate, and questions of a similar character, if he declines to answer on the ground that his answer might tend to criminate him. Counselman v. Hitchcock, 142 U. S. 547, 35 L. Ed. 1110, 12 Sup. Ct. 195, 3 Int. Com. Rep. 816 (1891).

As a result of this decision, the act above recited was passed; and it was held that the constitutional guaranty of protection against being compelled in any criminal case to be a witness against one's self is sufficiently satisfied by the provision of the act. Brown v. Walker, 161 U. S. 591, 40 L. Ed. 819, 16 Sup. Ct. 644, 5 Int. Com. Rep. 369 (1896). It was argued that the statute did not fully protect the witness, since his testimony might subject him to infamy and disgrace; but the court held that the fact that a witness cannot be shielded by statute from the personal disgrace or opprobrium attaching to the exposure of his crime does not render a statute exempting him from prosecution therefor insufficient to satisfy the constitutional guaranty of protection against being compelled to be a witness against himself. "A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or in good morals, to refuse to disclose that which may be of great public utility, in order that

his neighbors may think well of him. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. If it be once conceded that the fact that his testimony may tend to bring the witness into disrepute, though not to incriminate him, does no entitle him to the privilege of silence, it necessarily follows that if it also tends to incriminate, but at the same time operates as a pardon for the offense, the fact that the disgrace remains no more entitles him to immunity in this case than in the other."

It was further argued that the immunity did not extend to prosecutions in State courts. The court expressed the opinion that the statute would afford protection even in the State courts; but even if it did not the constitutional requirement would not extend to the case. The bare possibiliy that by disclosure a witness may be subjected to the criminal laws of some other sovereignty, and that he may be put to the annoyance and expense of pleading his immunity by way of confession and avoidance, notwithstanding the law has given him immunity from prosecution therefor, is not sufficient to render such immunity insufficient to satisfy the constitutional guaranty of protection against being compelled to be a witness against himself.

On the whole case, therefore, the Supreme Court held that a person could be compelled to answer. "If, as was justly observed in the opinion of the court below, witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the interstate commerce law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained. While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are therefore of opinion that the witness was compellable to answer."

§ 1069. Production of books and papers.

The rules of the Commission for the granting of a *subpoena duces tecum* are thus explained by the Commission. In the courts of the United States the practice appears to be for the application for a subpoena *duces tecum* to be made to the court, or the judge thereof, by petition supported by affidavit, unless the petition be the official statement of a district attorney, or other prosecuting public officer, of the facts therein alleged, and the facts set out in the petition must describe the books or papers called for with

that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him, and to have the books and papers at the trial, in order that they may be used if necessary before the tribunal in which the proceeding is pending. United States v. Babcock, 3 Dill. C. C. 566.

In section 869 of the Revised Statutes of the United States, a *prima facie* case must be made to the effect that the "paper, writing, written instrument, book or other document is in the possession or power of the witnesses, and that the same if produced will be competent and material evidence for the party applying therefor," before the subpoena *duces tecum* is issued.

In proceedings between parties where it is sought to compel parties who are not carriers subject to the act, or who are strangers to the proceedings, to produce books, papers, or documents, a proper rule is for an application to be made in writing to the Commission specifying, as nearly as may be, the books, papers, or documents, for the production of which the subpoena *duces tecum* is desired, accompanied by an affidavit that the books, papers, or documents described, are in the possession of the witness, or under his control, and setting forth facts which make a *prima facie* case that these contain evidence that is material and necessary to the party seeking their production, in the pending proceeding. Such a rule will not only conduce to the proper dispatch of business, and to the ends of justice, but it will guard the issue of such process against a latitude that may be useless or oppressive. Witnesses as well as parties, and frequently strangers, have rights in all such matters, and any rule upon the subject must be such as will have a due regard for the rights of all interested, while at the same time it reaches, with proper dispatch, the ends of justice, and the rule thus indicated is one of substance and not mere form.

The test of such an application for the compulsory production of books, papers and documents is: Does it make a *prima facie* case that they are in the possession or under the control of the witnesses, what they are by name, description, or such reference to them or to their contents as will indicate what said books or papers are, no matter by what name they may be called by those making or holding them, and setting forth facts which show that the same, if produced, will be competent and material evidence for the party applying therefor? Rice v. Cincinnati, W. & B. R. R., 2 Int. Com. Rep. 584, 3 I. C. C. 186 (1889).

An application to the Interstate Commerce Commission for *subpoenas duces tecum* may be denied, as applicable to contracts and papers of third persons not before the Commission, on the ground of injustice that might be done such persons. Haddock v. Delaware, L. & W. R. R., 3 Int. Com. Rep. 302, 4 I. C. C. 296 (1891).

§ 1070. Order to carrier to produce books.

Different principles, however, apply to the case where the Commission is asked to order production of books by the carrier. "The twelfth section of the Act to Regulate Commerce contemplates that 'the books' of the carrier shall be admissible in evidence for whatever light they will throw upon the transactions in question, as much so as the tariffs, schedules, rate sheets, contracts, or agreements the carrier may have made bearing in any way upon any of such transactions. These books, whether made up from shipping tickets, way bills, expense bills, or otherwise, are supposed to give the exact particulars of the consignment, showing the weight, rate, and amount of charges to be paid to the company's agent, and are put in this enduring form at the time of the consignment, as part of the transaction, upon rates that the law requires to be open and public, and thus they give a history of the details of the transaction. The relation that these books bear to every such transaction, and the attitude that those occupy in making and keeping them, under such circumstances, not only to the shipper and consignee, but to the public, would seem to fairly indicate that the rule as to a *prima facie* showing for their production when necessary to be used as evidence in a pending proceeding, to which the carrier is a party, should for obvious reasons not be as stringent as in the case of parties who occupy no such attitude or relation to the transactions, or who are strangers to the proceedings. It appears to us to be sufficient in such a case for the application to indicate in a general way what books of the carrier it is desired should be produced, and that there is reason to believe, and that the applicant does believe, that in the course of the hearing they will become of service on account of the light they will throw upon the questions in controversy in the proceeding, and as an evidence of good faith in making the application, the applicant should make an affidavit as part of the application, that such application is made in good faith, and not for the purpose of vexing or harassing the defendant, and that, generally speaking, upon such a showing as this the process should issue for the production of the books, unless the number of books called for should be so large, or from other exceptional circumstances, the Commission should order the testimony to be taken at such place as would avoid oppression in producing the books at a far-distant hearing, and expedite the progress of the investigation. We have seen cases in our experience where carriers, at the instance of complaining petitioners, were required to produce their books at a distance of hundreds of miles for the purposes of evidence at a hearing and when thus produced were not even opened by those at whose earnest call they were brought; and it would seem that there ought to be some safeguard in the shape of a rule." Bragg, Commissioner, in Rice v. Cincinnati W. & B. R. R., 2 Int. Com. Rep. 584, 594, 3 I. C. C. 186 (1889).

§ 1071. Methods of avoiding inconvenience of producing all books.

In order to avoid the inconvenience indicated at the end of the preceding section, various modes of procedure have been suggested by the Commission. The parties might, for example, take depositions, by consent, in advance of the hearing; or witnesses might be subpoenaed from the different companies proceeded against, and a notice served with the subpoena requiring the witness to furnish the published rates and tariffs of such company, for a specified period, and also requiring them to furnish statements of the actual charges made and car facilities furnished, during such period, to the persons named in the application, if different from the published tariffs and schedules. The Commission, having suggested these modes of procedure, added: "If a railroad company, or its officers, should refuse to furnish the proper evidence from its books in some such reasonable manner as is here indicated, it might then become necessary to resort to harsher proceedings, either by an examination of its books by a representative of the Commission, or by requiring the production of the books by compulsory process, and if need be, through the exercise of the authority of the courts, as provided in the statute." Bragg, Commissioner, in Rice v. Cincinnati, W. & B. R. R., 2 Int. Com. Rep. 584, 595, 3 I. C. C. 186 (1889). He added, however, that no railroad had yet refused to exhibit its books, and a petitioner would doubtless have no difficulty in obtaining any material and proper evidence in either of the modes indicated.

§ 1072. Petitioner thus gets all material and proper evidence.

The commissioner continued: "The documentary evidence called for from the books of the defendants, omitting such portions of it as we indicate to be immaterial and unimportant, according to what its import may be, may have a very legitimate bearing upon many, if not all, of the questions involved in these proceedings. They may be the best and only evidence that can be obtained upon some of these issues, and whatever information, if any, they contain upon any of these subjects the defendant carriers ought not to hesitate to furnish, and if they refuse to do this, upon a proper application, they will of course be compelled to do so by due process of law.

"Every purpose, however, that can be reached in these proceedings can be attained by proving the rates actually charged, if there were any such, to certain shippers or consignees that were different from the published tariff rates, or the preferential facilities, if there were any such, that were furnished by the defendants to some shippers or consignees, and not to others, or the comparative rates on the different commodities named in the complaints, and to designated points. We do not see the necessity or importance of showing, in all the minuteness of detail specified in

the application, the innumerable shipments over the various lines that were made for a period of many years before the Act to Regulate Commerce took effect, as well as since that date. . . . It seems to us sufficient for all the purposes of these cases to show the rates published, the rates actually charged, and the facilities furnished from and to designated points since the Act to Regulate Commerce went into effect, and, for whatever light these may throw upon the question of the reasonableness and justness of the rates, and the fairness of the facilities afforded, by way of comparison, what these were for a reasonable time—for example, a period of twelve months before the Act to Regulate Commerce went into effect." Bragg, Commissioner, in Rice v. Cincinnati, W. & B. R. R., 2 Int. Com. Rep. 584, 595, 3 I. C. C. 186 (1889).

§ 1073. Examination of witnesses upon prepared statements.

The usual procedure is for witnesses who are officers and agents of the carriers to come prepared with sworn statements taken from the books as to what they actually show. Examination and cross-examination verifies these statements and shows what supplements, if any, they need; these sworn supplements are furnished, and if all this is not found sufficient, the books are produced. If the need of such statements is developed in the course of the hearing, they are prepared and furnished. This practically satisfies the parties without the burden and expense to the carriers which an actual production of all the books would cause. Rice v. Cincinnati, W. & B. R. R., 2 Int. Com. Rep. 584, 595, 3 I. C. C. 186 (1889).

§ 1074. Hearing held where books are kept.

If a production of the books is necessary in any case, the Commission would be disposed to hold the hearing, or at least order the testimony to be taken, at such place as would reduce the trouble and inconvenience, "for it must be apparent that the mere labor of searching out the entries in these books and getting them together from the vast accumulations of a railroad office, running through long periods of time, would be enormous, and that their production at a far distant point, for the purposes of a hearing, in indefinite number and quantity, such as are called for by this application, might be unjustly oppressive, as well as very seriously inconvenient." Bragg, Commissioner, in Rice v. Cincinnati, W. & B. R. R., 2 Int. Com. Rep. 584, 595, 3 I. C. C. 186 (1889).

§ 1075. Adverse interest of witnesses not to be considered.

"In proceedings like these, which are judicial in their nature, and fairly governed by the rules and principles of law we have stated, it could not be said to be a sufficient excuse for making a preliminary order at

this stage of the proceedings for a general production of books, papers, and documents, such as is here asked for, that petitioner is apprehensive that witnesses might be unfriendly, and refuse to answer proper questions, or to give proper information. It is not to be assumed in advance that any railroad officer or agent, any more than any other witness, will refuse to respond to any question put to him, unless upon the advice of the counsel of the company that the question is improper. The probability would seem to be that the testimony of witnesses (taken at the railroad offices) would be as fully brought out by deposition, as at the open sessions of the Commission, for counsel would know very well that nothing was to be gained by giving improper advice in any spirit of litigious antagonism, and that the very refusal to testify freely might constitute a valid ground for compulsory proceedings, such as in the present state of the case would be unwarranted." Bragg, Commissioner, in Rice v. Cincinnati, W. & B. R. R., 2 Int. Com. Rep. 584, 596, 3 I. C. C. 186 (1889).

§ 1076. Rights of parties must be preserved.

"But while the defendants are entitled to have, as they must receive, the protection that the law affords against oppressive and unwarranted orders, for what has not yet been shown to be the necessary production of their books and papers in these proceedings, it is only proper to state that the petitioner who is here challenging an investigation of their rates and methods, in the course of legal procedure, has rights under the law for the production of evidence, material and necessary, in relation to his complaints, if it exists in their books and records, which are entitled to equal protection and assertion. In obtaining such evidence, if it exists, he is not to be burdened with methods of procedure oppressively expensive to him, and which unnecessarily delay the investigation, for if his complaint should turn out to be warranted to any considerable extent, then all such unnecessary delays cannot be otherwise than ruinously injurious to him, and to others who refine and ship coal oil, as he does, in barrels; nor can the fact be overlooked that if his complaints are not well founded it is peculiarly within the power of defendants who are carriers to show it without any great or expensive delays about it. To any extent that they can fairly and justly save time, labor, or expense to complainant, or to their companies, by giving to him, in response to any calls he may make, statements of facts shown in their books, records, or files, which may probably have importance on the hearing, the officers and agents of the respondents under the direction of respondents ought to give such statements, and ought to do so as promptly as may be found reasonably practicable. In other words, they ought to demonstrate a willingness to facilitate the investigation instead of assuming an attitude that may tend at every step to embarrass the proceedings. It seems also to us that in

these cases, as in others that have been pending before us, that the influence, efforts, and co-operation of counsel of the opposing parties might go very far to obviate expense and delay in all such matters as the mere production of statements of facts from entries in books and records, about the materiality and competency of which there can be no serious question. Much unnecessary controversy, inconvenience and delay might well be avoided in the first instance, as well as in subsequent stages of proceedings, if carriers would exhibit without technical objection, what their books show in reference to a transaction in question, to any one who calls for the information in good faith, believing, perhaps erroneously, that it is, or may be, important to his interests, and when the application is seasonably and properly made, with a due regard for the convenience of the carrier's agents and officers. The instances are numerous in which it would probably put the controversy at an end, or, if not, that the party would not then trouble the carrier for the production of the books. Such books, made up and kept as we have stated, in so far as they chronicle current rates, facilities furnished, or the general movements of freight, are in the nature of semi-public records.

"If parties and their counsel should follow the rules we have indicated, and adopt the suggestions we have made, we have no doubt that the ends of justice will be reached thereby with all proper dispatch, and that much inconvenience, expense, and delay will be avoided; but if this is not done, and a *prima facie* case is made by the complainant for the production of books, papers, tariffs, contracts, agreements, and documents relating to the matters under investigation in these proceedings, they will have to be produced; or, if during the course of these investigations, the evidence adduced shall show that any books, papers, tariffs, contracts, agreements, and documents relating to the matters in controversy in these proceedings are material and competent evidence, and needed for the purposes of the investigation, that itself will be a sufficient showing for their production, and they will have to be produced, unless counsel for the opposing parties shall agree that sworn statements of the facts they contain bearing upon the questions involved may be prepared and used as evidence in lieu of them." Bragg, Commissioner, in Rice v. Cincinnati, W. & B. R. R., 2 Int. Com. Rep. 584, 596, 3 I. C. C. 186 (1889).

§ 1077. Presumptions.

Voluntary continuance of a given rate for a long time by a carrier, while not conclusive, creates a presumption that the rate is reasonable. Re Export & Domestic Rates, 7 I. C. C. Rep. 214 (1897); Holmes v. Southern R. R., 8 I. C. C. Rep. 561 (1900); National Hay Assoc. v. Lake Shore & M. S. R. R., 9 I. C. C. Rep. 264 (1902). The presumption is in the nature of an admission by the carrier, and therefore exists only in a case where the carrier alters a long-existing rate by raising it. If, on the

other hand, the carrier voluntarily reduces a rate, in the absence of evidence of another reason for the reduction, it will be presumed that the former rate was unreasonably high. Holmes v. Southern R. R., 8 I. C. C. Rep. 561 (1900).

This presumption, however, being based on an admission of the carrier, is confined to cases where the prior rate was established and continued by the voluntary act of the carrier; it does not attach in a case where such rates have been established by carriers in compliance with the decision and order of the Commission. Proctor & Gamble Co. v. Cincinnati, H. & D. R. R., 9 I. C. C. Rep. 440 (1902).

A presumption of fact may be raised by the disproportion of two rates upon comparison. So where there is a great disproportion between two rates on the same road, or on different parts of the same line, there is a presumption against the reasonableness of the higher rate. Samuels v. Louisville & N. R. R., 4 Int. Com. Rep. 420 (1893); Troy Board of Trade v. Alabama Midland Ry., 6 I. C. C. Rep. 1 (1894); James v. Canadian Pac. R. R., 4 Int. Com. Rep. 274, 5 I. C. C. 612 (1893); Rea v. Mobile & O. R. R., 7 I. C. C. Rep. 43 (1897). So where certain rates were artificially enhanced by a traffic association for the purpose of carrying out an agreed division of territory betwen railroads, the rates were presumably unreasonable. Freight Bureau v. Cincinnati, N. O. & T. P. R. R., 6 I. C. C. Rep. 195 (1894). In the same way disproportion between rates on similar commodities will lead to a presumption against the higher rate. So where grain and grain products are classified alike, they are presumptively entitled to equal rates; and if a difference is made by a carrier, it assumes the burden of sustaining it by satisfactory evidence. McMorran v. Grand Trunk Ry., 2 Int. Com. Rep. 604, 3 I. C. C. 252 (1889).

§ 1078. Burden of proof.

Complainant has burden of establishing his case. Where a claim for reparation is made in a complaint of unreasonable railroad rates, the burden of proof is on complainant to prove the rates unreasonable. Harding v. Chicago & A. R. R., 1 Int. Com. Rep. 375 (1887); Perry v. Florida, C. & P. R. R., 3 Int. Com. Rep. 740, 5 I. C C. 97 (1891); Brownell v. Columbus & C. M. R. R., 4 Int. Com. Rep. 285, 5 I. C. C. 638 (1893). He has also the burden of showing what a reasonable rate would be, so as to show the excess. Holmes v. Southern R. R., 8 I. C. C. Rep. 561 (1900). And so a railroad company which seeks to release itself from its agreement to deliver goods for a specified freight rate, on the ground that the contract is illegal because the rate specified is less than that fixed by the Interstate Commerce Commission, has the burden of proving that the contract was necessarily unlawful, and not merely that it might have been so. Southern Pacific Co. v. Redding (Tex. Civ. App.), 43 S. W. 1061 (1897).

But in complaints founded on the fourth section of the act when the complainant shows a greater rate for a short haul the burden of proof is on the carrier to justify any departure from the general rule prescribed by the statute by showing that the circumstances and conditions attending the long and short hauls respectively are substantially dissimilar. Re Louisville & Nashville R. Co., 1 Int. Com. Rep. 278, 1 I. C. C. 31 (1887); Spartanburg Board of Trade v. Richmond & D. R. R., 2 Int. Com. Rep. 193, 2 I. C. C. 304 (1888); Re Chicago, S. P. & K. C. R. R., 2 Int. Com. Rep. 137, 2 I. C. C. 231 (1888); Raworth v. Northern Pacific R. R., 3 Int. Com. Rep. 857, 5 I. C. C. 234 (1892); Phillips v. Louisville & N. R. R., 8 I. C. C. Rep. 93 (1898).

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§ 1079. Dismissal when order unnecessary.

When upon investigation of a complaint the carrier finds that the grievance once existed, but has been removed by the carrier, the petition will be dismissed. Fulton v. Chicago, S. P. M. & D. R. R., 1 Int. Com. Rep. 375, 1 I. C. C. 104 (1887); Lincoln Board of Trade v. Union P. R. R., 2 Int. Com. Rep. 101, 2 I. C. C. 229 (1888); Harris v. Duval, 2 Int. Com. Rep. 514 (1889); Pennsylvania Co. v. Louisville, N. A. & C. R. R., 2 Int. Com. Rep. 603 (1889); Rawson v. Newport News & M. V. R. R., 2 Int. Com. Rep. 626 (1889); Michigan Box Co. v. Flint & P. M. R. R., 6 I. C. C. Rep. 335 (1895); Re Tariffs & Classifications of Pa. R. R., 7 I. C. C. Rep. 177 (1897); Boyer v. Chesapeake, O. & S. W. Ry., 7 I. C. C. Rep. 55 (1897); Paine v. Lehigh Valley R. R., 7 I. C. C. Rep. 218 (1897); Montell v. Baltimore & O. R. R., 7 I. C. C. Rep. 412 (1897); Wichita v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 507 (1903); Chicago Live Stock Exchange v. Chicago G. W. Ry., 10 I. C. C. Rep. 428 (1905). This is true though the grievance was removed after the beginning of the litigation. Michigan Box Co. v. Flint & P. M. R. R., 6 I. C. C. Rep. 335 (1895); and even after the hearing. Manufacturers & Jobbers' Union v. Minneapolis & S. L. Ry., 1 Int. Com. Rep. 630 (1887); Boyer v. Chesapeake, O. & S. W. Ry., 7 I. C. C. Rep. 55 (1897).

Similarly a complaint will be dismissed as to one carrier out of several defendants where it appears that such carrier did not participate in the rates in question. Chicago Live Stock Exchange v. Chicago G. W. Ry., 10 I. C. C. Rep. 428 (1905).

§ 1080. Reparation.

The Act to Regulate Commerce clearly confers authority upon the Commission to award damages in cases brought before it. Such an award is simply a recommendation, which can only be enforced by a suit at law

affording full opportunity for a jury trial. The act in this respect is constitutional and valid. Cattle Raisers' Assoc. v. Chicago, B. & Q. R. R., 10 I. C. C. Rep. 83 (1904). Under this provision, reparation will be ordered equal to the amount of any overcharge which the Commission finds to have been made. Macloon v. Chicago & N. W. Ry., 3 Int. Com. Rep. 711, 5 I. C. C. 4 (1891); Rea v. Mobile & O. Ry., 7 I. C. C. Rep. 55 (1897); Grain Shippers' Assoc. v. Illinois C. R. R., 8 I. C. C. Rep. 158 (1899); Chicago F. P. C. Co. v. Chicago & N. W. Ry., 8 I. C. C. Rep. 316 (1899); Roth v. Texas & P. Ry., 9 I. C. C. Rep. 602 (1903); Gardner v. Southern R. R., 10 I. C. C. Rep. 342 (1904); Pitts v. Atchison, T. & S. F. R. R., 10 I. C. C. Rep. 691 (1905); Pitts v. St. Louis & S. F. R. R., 10 I. C. C. Rep. 684 (1905); Hope Cotton Oil Co. v. Texas & P. Ry., 10 I. C. C. Rep. 696 (1905).

Under the act as first passed the Commission had held that it had no power to consider a claim for damages. Heck v. East Tennessee, V. & G. R. R., 1 Int. Com. Rep. 775, 1 I. C. C. 495 (1888); Council v. Western & A. R. R., 1 Int. Com. Rep. 638, 1 I. C. C. 339 (1887); Riddle v. New York, L. E. & W. R. R., 1 Int. Com. Rep. 787, 1 I. C. C. 594 (1888).

While the Commission found as a fact that the charges of defendant were in some instances unreasonable, it made no attempt to formulate an order, as it had no power to prescribe the rate that should be put into effect; but it held that complainant might apply to it for reparation in case it should thereafter be compelled to pay rates in excess of those indicated. Barrow v. Yazoo & M. V. R. R., 10 I. C. C. Rep. 333 (1904).

Reparation may also be awarded for damages caused by other violations of the act besides overcharge; for instance, for failure to furnish cars. Glade Coal Co. v. Baltimore & O. R. R., 10 I. C. C. Rep. 226 (1904); Paxton Tie Co. v. Detroit S. R. R., 10 I. C. C. Rep. 422 (1904).

The effect of an advance in through rates after the Supreme Court had dismissed a proceeding to have certain terminal charges declared unjust and unlawful, which dismissal was upon the ground that there had been a reduction in the through rate greater than the terminal charge, cannot be determined, in a proceeding in the same suit for reparation, as regards territory to which the reduction in the through rate did not apply, but is a matter for independent inquiry in a new proceeding. Cattle Raisers' Assoc. v. Chicago, B. & Q. R. R., 10 I. C. C. Rep. 83 (1904).

§ 1081. Proof of damage required.

Both the duty to make reparation and the amount of reparation to be made must be established by evidence. If the proof fails to establish either point satisfactorily the suit will be dismissed without prejudice. Freeman v. Atchison, T. & S. F. R. R., 7 I. C. C. Rep. 202 (1897); Commercial Club of Omaha v. Chicago & N. W. Ry., 7 I. C. C. Rep. 386 (1897); Castle v. Baltimore & O. R. R., 8 I. C. C. Rep. 333 (1899). Or the case

may, in the discretion of the Commission, be continued for further testimony. Business Men's League of St. Louis v. Atchison, T. & S. F. R. R., 9 I. C. C. Rep. 318 (1902); Richmond Elevator Co. v. Pere Marquette R. R., 10 I. C. C. Rep. 629 (1905); Dennison L. & P. Co. v. Missouri, K. & T. Ry., 10 I. C. C. Rep. 337 (1904). So proceedings before the Interstate Commerce Commission against common carriers for discriminations and preferences will be stayed until final determination by the courts in suits pending therein for the enforcement of an order of the Commission, compliance with which by carriers operating in the territory will remove the discriminations and preferences complained of. Southern Paint & G. Co. v. Lake Erie & W. Ry., 6 I. C. C. Rep. 284 (1894).

§ 1082. Conditions of granting reparation.

No reparation will be granted, though the Commission finds that the rates are unreasonable, unless it be found that the rates were unreasonable at the time they were paid. Grain Shippers' Assoc. v. Illinois Cent. R. R., 8 I. C. C. Rep. 158 (1899). Nor where the injury for which reparation is asked occurred through the fault of the complainant. Gardner v. Southern R. R., 10 I. C. C. Rep. 342 (1904). Nor where the claim for reparation has already been settled between the parties. Stahl v. Oregon Ry. & Nav. Co., 1 Int. Com. Rep. 314 (1887); Sayles v. New York, N. H. & H. R. R., 9 I. C. C. Rep. 492 (1903).

§ 1083. Finding of Commission does not work an estoppel.

The proceedings before the Commission not being strictly judicial, the doctrine of estoppel by judgment cannot properly be applied to the findings of the Commission. In Toledo Produce Exchange v. Lake Shore & M. S. R. R., 3 Int. Com. Rep. 830, 5 I. C. C. 166 (1892), it was argued by the defendants that the complainant was estopped from maintaining his complaint because in the cases of the Boston Chamber of Commerce against these defendants he was one of the committee appointed by the Chamber of Commerce to prosecute those cases and verified the petitions, and subsequently after investigation the Commission dismissed the petitions. Mr. Commissioner McDill said: "The doctrine of estoppel of record does not seem applicable to the case under consideration. It is applied to the record and judgment of both general and inferior courts. The Commission is not a court. It is a special tribunal whose duties though largely administrative are sometimes semi or quasi-judicial. It is required to investigate and report. The law creating the Commission does not mention its final act as a judgment. It renders no judgment, enters no decree. From these considerations it is not believed that the rule of estoppel by record, at all times technical in character, can be invoked by the defendants. It is true that the conclusive effects of judgments have been accorded and extended to the rulings of certain officials of the general government when

exercising functions which are judicial in their nature; as to the decision of the United States Commissioner of Patents in granting and extending a patent, Providence Rubber Co. v. Goodyear, 76 U. S. 9 Wall. 788, 19 L. Ed. 566; and to the decision of the Comptroller of the Currency upon matters within his jurisdiction in respect to the national currency, Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168, it will be found that in such cases the statute contemplated the act of the officer as final, but the whole scope and spirit of the "Act to Regulate Commerce" seems to stamp the report and order of the Commission as in no sense final in the sense that the judgment of a court is final, except where the parties impressed by the wisdom and justice of the order acquiesce therein in cases like those here under consideration. It is therefore held that nothing in the record of the Boston Chamber of Commerce cases, as compared with that of the case under consideration, estops Mr. Kemble from maintaining the complaint made by him."

§ 1084. Difference of parties.

Even if the doctrine of estoppel by record can ever be applied to the findings of the Commission, it can only be done when the parties are the same. One who appeared before the Interstate Commerce Commission in a representative capacity as a member of a committee of a complaining mercantile society, in proceedings which were dismissed, is not thereby estopped in a similar case brought by him as an individual. Toledo Produce Exch. v. Lake Shore & M. S. R. R., 3 Int. Com. Rep. 830; 5 I. C. C. 166 (1892). Mr. Commissioner McDill said: "In the Boston Chamber of Commerce cases Mr. Kemble was only related to those cases as a member of that body and one of its committee, while he makes this complaint individually, and as a shipper and dealer in the character of goods, which he alleges is subjected to an unreasonable and unjustly discriminative rate. The character of his relation to the cases, is entirely different. In the one it is representative; in the other individual and personal."

§ 1085. How far party may reopen case.

It is generally true that the findings of the Commission will not conclude the unsuccessful party for all time. Conditions of transportation vary from time to time, and rates should ordinarily be adjusted to such changed conditions, and it is possible, therefore, that the petitioners may be able to show that a change has taken place so that the contention which was formerly unsuccessful may now be reasonable and just. Rice v. Western N. Y. & P. R. R., 2 Int. Com. Rep. 496, 3 I. C. C. 87 (1889); Interstate Commerce Com. v. Louisville & N. R. R., 73 Fed. 410, 5 Int. Com. Rep. 656 (1896).

It is not to be understood, however, that the findings have no binding effect whatever. If a matter has once been investigated by the Commis-

sion and a finding made, the same question will not afterwards be differently decided unless new evidence is presented, even though it arises upon the complaint of other parties. This principle was carefully considered by the Commission in Board of Railroad Commissioners v. Atchison, T. & S. F. R. R., 8 I. C. C. Rep. 304 (1899). Mr. Commissioner Prouty said:

"In 1890 exactly this question was presented and decided by this Commission in the case of Kauffman Milling Co. v. Missouri P. R. Co., 4 I. C. C. 417, 3 Int. Com. Rep. 400. The territory involved was identical. The differential was the same then as now. The claims of the parties upon that hearing were in no material respect different from those which have been made upon this trial. It did not appear in the present proceeding that any new conditions had come into existence, or that old conditions had been essentially modified.

"Questions coming before this body are not of a character that the decision in one case is necessarily controlling in all similar cases. Its decisions can hardly be said to have the effect of an estoppel, nor is there the same reason for applying the maxim *stare decisis* which exists in courts of law. Conditions continually vary at different times and in different localities. But when in a case like this the relation in freight rates determines where and how business shall be done, the decisions of this Commission fixing or approving a given relation should only be reversed for imperative reasons. Ten years ago this differential was approved. It may well be that since then money has been invested and industries built up upon the strength of that approval. In the absence of some showing that new conditions have intervened, or that the effects of the original holding have been other than were anticipated, we think that that case must control the disposition of this."

And upon the precise point litigated and decided the finding may be a complete bar to further proceedings before the Commission. The defendant, if the finding is against him, may disregard it, and the question must then be taken to the courts, where the finding is not binding. If the finding is against the complainant it is final; and in any case if the complainant has his option of suit or complaint to the Commission, his appeal to the Commission bars him from suit. So the final judgment in a suit or proceeding before the Interstate Commerce Commission, unreversed and remaining of record in full force and effect, is a bar to an action in the United States Circuit Court brought to recover damages from the same violation of the Act to Regulate Commerce. Riddle v. New York, L. E. & W. R. R., 3 Int. Com. Rep. 230 (1889).

§ 1086. New petition may be filed.

When new conditions have arisen since the original investigation and report of the Commission neither the parties, as has been seen, nor others,

are bound by the former finding. It follows that the new conditions need not be presented in a petition for a rehearing; a new petition may be filed, and this would seem to be the better course. This is clearly true where the parties to the new application were not parties to the former complaint; the new parties should file a new complaint, and if upon this new complaint it should appear that any conclusion in the former case so decided has been erroneous, the Commission would feel it to be a duty to correct such conclusion. Re Petition of Toledo Produce Exchange, 2 Int. Com. Rep. 412, 2 I. C. C. 588 (1889).

§ 1087. Reopening a case for rehearing.

An application to the Commission to reopen a case for rehearing is addressed to its discretion, like a similar application to a court; and will be decided upon the same considerations. A petition to reopen a case that has been decided, and for a rehearing, should show *prima facie* that some material testimony has been overlooked or misapprehended, or some error in the findings of fact or conclusions of law. When the application is insufficient in these respects, and only asks for a rediscussion of the facts and law already considered, with no offer of new evidence that can change the result, being therefore, in substance, that a different conclusion should be reached upon the same facts, the application will be denied. Myers v. Pennsylvania Co., 2 Int. Com. Rep. 544 (1889).

So a case before the Interstate Commerce Commission will not be reopened in a supplementary proceeding brought simply to secure reparation, for the purpose of ruling on questions not decided in the original case, where the petition for reparation was not filed until long after the original decision had been rendered and the offending carrier had complied therewith. Rice v. Western N. Y. & P. R. R., 6 I. C. C. Rep. 455 (1895). And after a complaint upon elaborate pleadings and proofs has been heard and determined by the Commission, an application for a rehearing, made only by those who were not parties to the proceeding, will not be granted. Re Petition of Toledo Produce Exchange, 2 Int. Com. Rep. 412, 2 I. C. C. 588 (1889).

The Commission, however, will grant a rehearing if it is in the interests of justice. This may be the case, even though the finding of the Commission has been reviewed by the courts. In the case of Page v. Delaware, L. & W. R. R., 6 I. C. C. Rep. 548 (1896), it appeared that the Circuit Court had refused to enforce the original order of the Commission, which found the rates on window shades excessive, on the ground that the order applied to all shades, whereas it ought not to apply to the highest priced shades. The Commission reopened the case, granted a rehearing, modified its order so as to except from it shades valued at more than $6.00 per dozen, and renewed the order with this modification.

If upon a rehearing of a case before the Interstate Commerce Commission, additional evidence warrants a finding contrary to what appeared and was found in the original hearing, the former order may be vacated. Bates v. Pennsylvania R. R., 3 Int. Com. Rep. 296, 4 I. C. C. 281 (1890).

The general principle upon which petitions for rehearing would be dealt with was stated by the Commission in the first case of the sort, Riddle v. Pittsburgh & L. E. R. R., 1 Int. Com. Rep. 773, 1 I. C. C. 490 (1888), as follows: "When we have patiently and laboriously sifted out all the material facts necessary to fairly and justly present the merits of the controversy, with our conclusions thereon, we have done all that the statute authorizes or requires us to do. The statute deals with the substance of things, and contemplates, as far as this is possible, methods of procedure that are speedy and which come at once to the very right of questions arising in the transportation of persons and freight; and while in its administration we will always cheerfully and carefully examine and consider all applications for rehearings by a party to any proceeding decided by us who will point out any errors he may think we may have committed, either of law or fact, with a view to their prompt correction, if found to exist, yet we will not in any proceeding direct a rehearing involving the expense to parties of appearing before us for a reargument of the case and the further consumption of time on our part, which belongs to the public unless satisfied that such reargument might have the effect of changing the result of what we have already done."

§ 1088. Form and requisites of petition for rehearing.

After a case has been decided by the Interstate Commerce Commission, a petition to open it for further testimony and a rehearing should be verified, and should indicate the nature of the new testimony and its purpose; and although technical rules of procedure are not insisted on, and equitable considerations largely enter into the question of rates, such an informal application would not of itself be considered. But when a question of general public interest is involved, the Commission, in its own discretion and in furtherance of justice, may open a case to give parties the benefit of a more extended investigation of the same subject matter; and this was done in a case where other parties in the same business had filed similar petitions, and the question was to be thoroughly reconsidered in connection with these other petitions. Rice v. Western N. Y. & P. R. R., 2 Int. Com. Rep. 496, 3 I. C. C. 87 (1889).

A petition or motion for rehearing cannot be granted on mere allegation of error in the findings of fact; and such a petition or motion must be supported by proof of new facts or by specifically pointing out facts already in evidence showing *prima facie* at least that there was such error. Proctor v. Cincinnati, H. & D. R. Ry., 3 Int. Com. Rep. 374, 4 I. C. C. 87 (1890).

CHAPTER XXXV.

JUDICIAL REMEDIES.

§ 1091. Provisions of the statute.
1092. Amendments of 1906.
1093. Jurisdiction and general principles.
1094. Remedy in equity.
1095. Mandamus.
1096. Action for damages.
1097. Criminal prosecution.
1098. Procedure under the Elkins act.
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§ 1091. Provisions of the statute.

Action for damages.—That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery which attorney's fee shall be taxed and collected as part of the costs in the case.

That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies,

and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. (Interstate Commerce Act, sections 8 and 9.)

Criminal clauses.—Sec. 10. That any common carrier subject to the provisions of this act, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof in any district court of the United States, within the jurisdiction of which such offence was committed, be subject to a fine of not to exceed five thousand dollars for each offence:

Provided, That if the offence for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or

property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and wilfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offence was committed, be subject to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offence.

Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offence was committed, be subject for each offence

to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation or otherwise, induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person, or such officer or agent of such corporation or company, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offence was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offence; and such person, corporation, or company shall, also, together with said common carrier, be liable, jointly, or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

[Interstate Commerce Act, section 10, as amended by section 2, act of March 2, 1889.]

Corporation liable: penalties.—That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this Act with reference to such persons, except

as such penalties are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation, to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall offer, grant, or give, or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: Provided, that any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is

begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Any person, corporation or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided for by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is author-

ized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the value of such consideration, so received or accepted, or both, as the case may be. [Act of February 19, 1903 (Elkins Act), section 1, as amended by Act of June 29, 1906, section 2.]

Interested persons may be made parties.—That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any Circuit Court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers. [Act of February 19, 1903 (Elkins Act), section 2.]

Injunction against violation of the Act.—That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged

to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct, and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled an Act to regulate commerce and the acts amendatory thereof. And in proceedings under this Act and the acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prose-

cuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: Provided, that the provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission. [Act of February 19, 1903 (Elkins Act), section 3.]

Sec. 4. That all acts and parts of acts in conflict with the provisions of this Act are hereby repealed, but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act. [Act of February 19, 1903 (Elkins Act), section 4.]

Expediting trials.—In any suit in equity pending or hereafter brought in any Circuit Court of the United States under the act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over

others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided. [Act of February 11, 1903, section 1.]

Appeals.—That in every suit in equity pending or hereafter brought in any Circuit Court of the United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the Circuit Court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided,* That in any case where an appeal may have been taken from the final decree of a Circuit Court to the Circuit Court of Appeals before this act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law. [Act February 11, 1903, section 2.]

Upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriation for the expenses of the courts of the United States. [Interstate Commerce Act, section 12.]

Complaint for non-payment of damages. — That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the Commission shall

make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the Circuit Court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after: *Provided,* That claims accrued prior to the passage of this Act may be presented within one year.

Parties.—In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district

where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

Service of order of Commission.—Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be *prima facie* evidence of the receipt of such order by the carrier in due course of mail.

Suspension or modification of orders of Commission.—The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Duty of carrier to comply with order.—It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Penalty for failure to comply with order.—Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section 15 of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

The forfeiture provided for in this Act shall be payable into the treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

Prosecution for failure to comply with order.—It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prose-

cution shall be paid out of the appropriation for the expenses of the courts of the United States. The Commission may, with the consent of the Attorney-General, employ special counsel in any proceeding under this Act, paying the expenses of such employment out of its own appropriation.

"If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the Circuit Court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

Appeal.—From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

Venue.—The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts.

Expediting suits.—The provisions of 'An Act to expedite the hearing and determination of suits in equity, and so forth,' approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing of an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting Act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes.

Injunction granted only after hearing.—"Provided, that no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from any inter-

locutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: Provided further, that the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.

Schedules and returns of carrier's evidence.— "The copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements or arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this Act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals." [Interstate Commerce Act, section 16, as amended by Act of June 29, 1906, section 5.]

Mandamus to compel transportation or facilities.—That the Circuit and District Courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement, and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for

the writ. Provided, that if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: Provided, that the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the act to which it is a supplement. [Act of March 2, 1889, being section 23 of the Interstate Commerce Act.]

That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all acts amendatory thereof shall apply to any and all proceedings and hearings under this Act. [An Act of June 29, 1906, section 9.]

That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law. [Act of June 29, 1906, section 10.]

§ 1092. Amendments of 1906.

Sections 8, 9, 10, 12 of the original act, sections 2 to 4 of the Elkins act, the act of February 11, 1903, for expediting trials, and the act of March 2, 1889, granting mandamus to compel transportation, are unamended. The principal amendments to section 1 of the Elkins act and to section 16 of the original act, are as follows:

1. The punishment of imprisonment for giving or receiving rebates is restored.

2. An additional penalty is imposed on the shipper in the form of the forfeiture of three times the amount received by way of rebate.

3. A statute of limitations is provided. In the original act no provision for limitation of suits was included.

4. A penalty is imposed for failure by a carrier to comply with the

order of the Commission, and provision is made for recovery of the penalty at suit of the Attorney-General.

5. Court review of the orders of the Commission is regulated. Procedure being by injunction against the enforcement of such orders, it is provided that such injunction shall be granted only upon hearing and after due notice to the Commission.

§ 1093. Jurisdiction and general principles.

The jurisdiction of the Federal courts under this section does not depend upon diverse citizenship, but upon the jurisdiction over commerce; and this is sufficient to sustain the jurisdiction of the Circuit Court, independent of the citizenship of the parties to the controversy, since it involves a federal question. Kentucky & I. Bridge Co. v. Louisville & N. R. R., 37 Fed. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351 (1889). Indeed, even if it is begun in a State court, a suit to recover damages for acts which constitute a violation of the Interstate Commerce Act, the construction of which is in dispute between the parties, present a Federal question for which it may be removed to a Federal court. Lowry v. Chicago, B. & Q. R. R., 46 Fed. 83, 4 Int. Com. Rep. 435 (1891). Even if the remedies prescribed by the act are not applicable to a particular case arising under its provisions, this does not deprive the United States Circuit Court of jurisdiction, since by the Judiciary Act such courts are given jurisdiction of all controversies arising under any act of Congress. Little Rock & M. R. R. v. East Tennessee, V. & G. R. R., 47 Fed. 771, 4 Int. Com. Rep. 261 (1891). And the remedies given by the act are intended to supplement, not to supplant, the existing remedies. Little Rock & M. R. R. v. East Tenn. V. & G. R. R., 47 Fed. 771, 4 Int. Com. Rep. 261 (1891); Tift v. Southern Ry., 123 Fed. 789 (1903). And the United States Circuit Court has jurisdiction to enforce any rights arising under the interstate commerce law, although the same rights may have existed at common law. Toledo, A. A. & N. M. R. R. v. Pennsylvania Co., 54 Fed. 730, 5 Int. Com. Rep. 522 (1893).

The principal office is the one where its principal officers have their business domicil, the meetings of stockholders, directors, and executive committee are held, the stock books kept and the dividends declared, rather than the place where the subordinate officers in charge of the operating, traffic, and accounting departments of the business, discharge their duties. Interstate Commerce Commission v. Texas & P. Ry., 4 Int. Com. Rep. 62 (1892). A United States Circuit Court has jurisdiction of a bill by the Interstate Commerce Commission to enforce its order against a railroad company which has its principal office in another district, where such company in connection with other companies operates all their roads under a common management or arrangement in making the interdicted rates, although such company by itself has been guilty of no violation of

the order in the district. Interstate Commerce Commission v. Southern Pacific Co., 74 Fed. 42 (1896).

Newly organized companies into which the railroads of two companies, violating an order of the Interstate Commerce Commission in pursuance of a common arrangement between them and other roads, pass, are properly made defendants in a suit to enforce the order of the Commission. Interstate Commerce Commission v. Western N. Y. & P. R. R., 82 Fed. 192 (1897).

The statute of limitations of the State in which the offense was committed applies in actions under the Interstate Commerce Act to recover back freight paid to a carrier in excess of that charged other shippers, since no period of limitation is named in the act itself. Copp v. Louisville & N. R. R., 50 Fed. 164, 4 Int. Com. Rep. 805 (1892); Ratican v. Terminal Assoc., 114 Fed. 666 (1902). See Carter v. New Orleans & N. E. R. R., 143 Fed. 99 (1906). Under the amendments of 1906 a two-year term of limitation is provided.

The Judiciary Act of 1887, passed subsequently to the Interstate Commerce Act, modified the procedure on appeal provided in the latter; and the appeal now lies from the Circuit Court to the Circuit Court of Appeals. Interstate Commerce Commission v. Atchison, T. & S. F. R. R., 149 U. S. 264, 37 L. Ed. 727, 13 Sup. Ct. 837, 4 Int. Com. Rep. 347 (1893). If the decision of the Circuit Court, affirming the validity of an order of the Interstate Commerce Commission, made under a misconception of the extent of its powers, is erroneous, it should be reversed by the Circuit Court of Appeals and the order set aside and the cause remanded to the Commission in order that the latter, if it saw fit, might proceed therein according to law; and the Circuit Court of Appeals should not undertake of its own motion to find and pass upon the questions of fact involved which were not considered by the Commission. Texas & P. R. R. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666, 5 Int. Com. Rep. 405 (1896). By an amendment of 1903, an appeal lies directly from the Circuit Court to the Supreme Court.

§ 1094. Remedy in equity.

A mandatory injunction, compelling the carrier to carry at a certain rate, cannot be issued, since the court has no greater power than the Commission to fix a rate. Southern Pac. Co. v. Colorado F. & I. Co., 101 Fed. 779, 42 C. C. A. 12 (1900). An injunction against violating a proper order of the Commission will be granted, nor will it alter the duty of the court to enjoin the violation of the order that another wrongdoer is also violating it. Interstate Commerce Commission v. Texas & P. R. R., 52 Fed. 187, 4 Int. Com. Rep. 114 (1892). See Re Transportation of Coal & Mine Supplies, 10 I. C. C. Rep. 473 (1905). The injunction must be directed against specific acts; a carrier cannot be enjoined in general from

violating the act in any particular. New York, N. H. & H. R. R. v. Interstate Commerce Com., 200 U. S. 361, 26 Sup. Ct. 272 (1906).

A preliminary injunction never issues as of right, but rests in the sound discretion of the court. In order to obtain it, the plaintiff should show either that his right is very clear, or that the injunction will operate with but little injury to the defendant, if granted, and that, if refused, the injury to himself will be very great. Where the inconvenience to result is equally divided, or the preponderance is in favor of the defendant, it will be refused. Neither is a plaintiff entitled to preliminary injunction where his rights depend upon unsettled and disputable questions of law. Upon a motion for preliminary injunction the comparative inconvenience and injury to the parties must be looked at, and the injunction will not be granted when the injury to the defendant is likely to be greater than the benefit to the complainant.

It has therefore been held that under section 16 of the act no preliminary injunction will be issued. The questions involved are for the first time presented for judicial determination, as the Interstate Commerce Commission is an administrative body, and not a court. In the first place, the petitioner is entitled to a speedy hearing, and delay of the injunction for a short time will not seriously injure him; while on the other hand the injury to the defendant will be serious if it finally appears that the injunction is not warranted. The injunction, if issued, would stand for some time, and the total amount of money lost by the carrier will be very large, and not possible otherwise to collect; a long adherence to the lower schedule of rates will make it very difficult to restore the old rates; and the establishment of the lower rates may involve a readjustment of rates over a large territory. As a result of such considerations the courts have held that only a final injunction after hearing on pleadings and proofs would be granted. Shinkle, W. & K. Co. v. Louisville & N. R. R., 62 Fed. 690, 5 Int. Com. Rep. 282 (1894); Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry., 64 Fed. 981, 5 Int. Com. Rep. 131 (1894).

§ 1095. Mandamus.

The Federal courts have no power, on application by the Commission, to compel a carrier to file the reports called for by section 20 of the act. Knapp v. Lake Shore & M. S. Ry., 197 U. S. 536, 49 L. Ed. 870, 25 Sup. Ct. 538 (1905).

The act itself confers authority on the courts to grant a writ of mandamus on relation of an individual where unjust discrimination is made out, but only when that is done. United States v. Delaware, L. & W. R. R., 40 Fed. 101 (1889); In re Morris, 40 Fed. 824, 2 Int. Com. Rep. 617 (1889). It will not lie to enforce mere private contractural obligations, and therefore the writ was refused where the relator complained that he did not receive his fair share of cars according to a contract between the

carrier and various shippers of coal and coke for furnishing cars in proportion to the number of coke ovens operated. United States v. Norfolk & W. Ry., 138 Fed. 849 (1905).

So where the court is asked to grant a writ of mandamus to compel a fair distribution of cars, it will not be granted unless unjust discrimination is alleged and proved; but if it is proved the writ will be granted. United States v. Norfolk & W. Ry., 109 Fed. 831 (1901), 143 Fed. 266 (1906).

§ 1096. Action for damages.

While the remedy by way of damages for unlawful rates is utterly inadequate and inconsistent, it is apparently the remedy prescribed by the Act to Regulate Commerce, and the only remedy which the shipper has against the exaction of an unreasonable interstate rate. McGrew v. Missouri P. Ry., 8 I. C. C. Rep. 630 (1901). The pendency of a suit before the federal courts bars proceedings before the Commission; but a suit in the State court does not have that effect. Gallogly v. Cincinnati, H. & D. Ry., 11 I. C. C. Rep. 1 (1905). The measure of damages, where unjust discrimination is found, is the difference paid by the plaintiff and the favored shippers for like services. Junod v. Chicago & N. W. Ry., 47 Fed. 290 (1891). For form of complaint, see Kimavey v. Terminal Ry. Assoc., 81 Fed. 802 (1897). Since the remedy is given only to an injured party, a plaintiff in order to recover must show not only the wrong of the carrier but that the wrong has operated to his injury. Parsons v. Chicago & N. W. Ry., 167 U. S. 447, 42 L. Ed. 232, 17 Sup. Ct. 887 (1897).

Section 12 of the act is constitutional and valid, so far as it authorizes or requires the circuit courts of the United States to use their process in aid of inquiries before the Interstate Commerce Commission. Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. Ed. 104, 14 Sup. Ct. 1125, 4 Int. Com. Rep. 545 (1894).

An action by the district attorney may be maintained in the name of the United States. United States v. Missouri Pac. R. R., 65 Fed. 903, 5 Int. Com. Rep. 106 (1894). And the Commission need not first investigate the case. *Ibid.*

§ 1097. Criminal prosecution.

It was said in United States v. Michigan Central R. R., Fed. , 3 Int. Com. Rep. 287 (1890), that a railroad company cannot be indicted for violation of the act; but this seems to be a mistake. United States v. Cleveland, C. & S. R. R., Fed. , 3 Int. Com. Rep. 290 (1890). But a carrier which has conformed to the ruling of the Commission should not be prosecuted for alleged violation of law in that respect, which occurred before such ruling was made and under a construction of the law then

approved by the carrier's counsel. Slater v. Northern P. R. R., 2 Int. Com. Rep. 243 (1888). An indictment will lie against any officer, director, agent, or employe of a carrier who aids and abets in violation of the Interstate Commerce Law, as well as against the carrier, such officers and employes having knowledge that they are engaged in an illegal act. United States v. Cleveland, C. & S. R. R., 3 Int. Com. Rep. 290 (1890); United States v. Mellen, 53 Fed. 229, 4 Int. Com. Rep. 247 (1892); United States v. Howell, 56 Fed. 21, 4 Int. Com. Rep. 818 (1892). The proof, as in all criminal cases, should be clear and leave no reasonable ground for doubt as to their guilty knowledge of the illegality of the act, and men who occupy merely clerical positions, who are only the instruments which carry out an unlawful action or contract made by their superior officers, which they do not concoct, should not be punished for violation of the Interstate Commerce Act, except where the proof of guilty knowledge and participation is clear. United States v. Michigan Central R. R., 43 Fed. 26, 3 Int. Com. Rep. 287 (1890). So collecting and receiving freight charges does not subject one who had nothing to do with fixing the rates, to indictment under the long and short haul clause of the Interstate Commerce Act, although the rates are within the prohibitions of that Act. United States v. Mellen, 53 Fed. 229, 4 Int. Com. Rep. 247 (1892).

But one overt act need be proved to sustain an indictment for conspiring to violate the United States Act of March 2, 1889, against obtaining transportation for property over railroads at less than regular rates. United States v. Howell, 156 Fed. 21, 4 Int. Com. Rep. 818 (1892). When an agent of a railroad is prosecuted under the Interstate Commerce Act, it is not necessary either to allege or prove that the particular unlawful act complained of was done under authority conferred by its principal or by its direction; it is sufficient to show that the accused was in fact an agent of a railroad subject to the act, and that the wrong was commited under color of his office or agency. United States v. Tozer, 39 Fed. 904, 2 Int. Com. Rep. 422 (1889). An indictment against an express company for violation of the Interstate Commerce Act, inasmuch as the liability of such companies under the act must depend on the manner in which the business is conducted,—as, for instance, where it is conducted by railroad companies,—must show by proper averment the facts to bring the case within the law. United States v. Morsman, 42 Fed. 448, 3 Int. Com. Rep. 112 (1890).

A conviction for criminal violation of the section of the Interstate Commerce Act which prohibits undue or unreasonable preferences or advantages cannot be sustained upon the finding of a jury that a certain charge was an unreasonable preference, if no standard of comparison is established by which such unreasonableness is shown with definiteness and certainty. Tozer v. United States, 52 Fed. 917, 4 Int. Com. Rep. 245 (1892). The objection that an indictment under the long and short haul clause of

the Interstate Commerce Act is an attempt by the government to interfere with the revenues of the railroad contrary to the terms of the contract under which it was built cannot be raised upon a motion to quash. United States v. Mellen, 53 Fed. 229, 4 Int. Com. Rep. 247 (1892).

The venue of the indictment is the place where the illegal act is done. In an indictment for securing transportation at less than legal rates by false billing, the offence is committed where the property is delivered for transportation. Davis v. United States, 104 Fed. 136, 43 C. C. A. 448 (1900).

The form of indictment for various violations of the act was considered in United States v. Tozer, 39 Fed. 904, 2 Int. Com. Rep. 422 (1889). It was there held that an indictment for unjust discrimination, under section 2, need not aver by what particular device the defendant managed to discriminate in favor of a particular shipper; that a count under section 9 is sufficient if it shows with requisite certainty, by any apt language, that the accused has committed an act which gives one shipper or class of shippers an advantage, or subjects others to a disadvantage; that a count under section 3, charging the subjection of a certain locality to an undue prejudice by charging its merchants a higher rate for transporting property to a certain point than was exacted from residents of a certain other locality, must show with precision that the lower rate was for transportation between the same points as the higher rates; that counts under section 2 for "undue and unreasonable preference," and "for undue or unreasonable prejudice or disadvantage," need not allege that the service for which a different rate was charged was rendered "under substantially similar circumstances and conditions,"—those words being found only in section 4, in relation to greater charge for shorter haul; and that a count under section 6, alleging the allowance of a rate less than the established and published rate which "was in force on that day," sufficiently negatives the inference that the rate might have been reduced by the carrier without notice, as permitted by that section. For other cases in which the form of indictment was considered, see United States v. Hanley, 71 Fed. 672 (1896); United States v. DeCoursey, 82 Fed. 302 (1897).

§ 1098. Procedure under the Elkins Act.

The provisions of the Elkins Act apply not only to violations of the Interstate Commerce Law subsequent to its enactment, but to every violation, whether previously or subsequently. United States v. Michigan Cent. R. R., 122 Fed. 544 (1903). A suit to enjoin a common carrier from discriminating between localities in violation of the Act to Regulate Commerce could not be brought on behalf of the United States by its law officers at the request of the Interstate Commerce Commission prior to the passage of this act. Such a suit having been brought before the act and a decree granting the relief prayed for having been made in the Circuit

Court, the decree was reversed; but the new remedies given by the act are so far made applicable to prior pending proceedings by section 4 of the act that the cause will be remanded for further procedings consistent with the Act to Regulate Commerce as originally enacted and subsequently amended by the Elkins Act. Missouri Pacific Ry. v. United States, 189 U. S. 274, 47 L. Ed. 811, 23 Sup. Ct. 507 (1903). But as an injunction is issued only against present or threatened acts, none will be issued under these circumstances unless the illegal act is continuing. United States v. Atchison, T. & S. F. Ry., 142 Fed. 176 (1905). For form of a bill under this act, see United States v. Milwaukee R. T. Co., 142 Fed. 247 (1905). Section 3 of the act applies to all discrimination forbidden by law. Interstate Commerce Commission v. Chicago G. W. Ry., 141 Fed. 1003 (1905).

§ 1099. Enforcement of order of the Commission.

The shipper, if reparation is not made, may bring an action at law. This action may be brought by any beneficiary of an order, even if he was not a party to the proceedings before the Commission. Thus shippers whose claims for reparation for damages for wrongful charges for transportation of oil covered by an order of the Interstate Commerce Commission, but who have not been served in the reparation proceedings before the Commission, may, upon failure of the carriers to properly refund excessive charges, proceed on the basis of reparation prescribed on such order to enforce their claims in the courts as provided by law. Independent Ref. Assoc. v. Western N. Y. & P. R. R., 6 I. C. C. Rep. 378 (1895). The better practice, however, at least in a case of any doubt, is for all shippers to file intervening petitions before the Commission and obtain individual orders for reparation, upon which they may proceed in court. Cattle Raisers' Assoc. v. Chicago, B. & Q. R. R., 10 I. C. C. Rep. 83 (1904).

The *bona fides* of a complaint of discrimination by a carrier cannot be attacked in the Circuit Court by impeaching the good faith of those who in the first instance induced the Interstate Commerce Commission to take action under the provisions of the Interstate Commerce Law for the lodging by any person of complaints with the Commission, and that no complaint shall be dismissed because of the absence of direct damage to the complainant, but that the Commission may institute any inquiry on its own motion, and requiring the Commission, if the law has been violated, to notify the carrier to cease from further violation, and, in case of its refusal, to apply by petition to a Circuit Court in equity to enforce its order. Interstate Commerce Commission v. Detroit, G. H. & M. R. R., 57 Fed. 1011, 4 Int. Com. Rep. 722 (1893).

The common form of proceeding for enforcing the order of the Commission is under the provision giving the Commission the power to apply to the courts. Under this provision of the act the findings of fact of the Commission are not conclusive in proceedings before the court, even if

the court finds that the matter was fully and fairly investigated by the Commission. The court must still independently investigate the whole merits of the controversy and form an independent judgment upon them; and in such investigation the findings of fact made by the Commission are only *prima facie* evidence, and additional evidence may be introduced. Inter. Com. Comm. v. Alabama Mid. Ry., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45, B. & W. 433 (1897); Kentucky & I. Bridge Co. v. Louisville & N. R. R., 37 Fed. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351 (1889); Interstate Commerce Commission v. Lehigh Valley R. R., 49 Fed. 177, 3 Int. Com. Rep. 796 (1892); Interstate Commerce Commission v. Atchison, T. & S. F. R. R., 50 Fed. 295, 4 Int. Com. Rep. 323 (1892). The opinion of the Interstate Commerce Commission has not the effect of a judicial determination, and in a proceeding to enforce it the court proceeds to hear the complaint *de novo*. Shinkle, W. & K. Co. v. Louisville & N. R. R., 62 Fed. 690, 5 Int. Com. Rep. 282 (1894). The conslusions of the Commission are, however, *prima facie* correct, and in a suit to enforce its orders the burden rests upon the company to show them to be erroneous. Interstate Commerce Commission v. Louisville & N. R. R., 118 Fed. 613 (1902). The mere opinion of the Commission, however, not being a finding of fact, is not admissible in evidence and will not be considered by the court. Western N. Y. & P. R. R. v. Penn. Refining Co., 137 Fed. 343 (1905).

It is not necessary to file with a petition for the enforcement of an order of the Interstate Commerce Commission the transcript of the evidence taken before it, under the statute making the findings of fact of the Commission *prima facie* evidence of the matter stated; but either party may introduce and use as evidence any competent and relevant testimony taken before the Commission. The court may reject any portion which is irrelevant or incompetent. If any evidence has been taken *ex parte* in the proceedings before the Commission, the court may require that there shall be full opportunity for cross-examination before it will be received or considered. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. R., 64 Fed. 981, 5 Int. Com. Rep. 131 (1894).

As the findings of fact are not conclusive against the carrier, so they are not conclusive in its favor. Therefore a demurrer will not lie to a petition by the Interstate Commerce Commission to compel a railroad company to desist from exacting unreasonable rates on the ground that the Commission's findings of fact does not support its order if the findings expressly state that the charge made is unreasonable, although the findings may not appeal to the judgment of the court upon the merits. Interstate Commerce Commission v. Chicago, B. & Q. R. R., 94 Fed. 272 (1899).

The enforcement of the order of the Commission alone being within the power of the court, it cannot modify such order. Therefore the court cannot, upon a certificate of the Interstate Commerce Commission that in making an order which the court is asked to enforce the Commission did

not design to make it so broad as its terms import, enforce the order in such restricted sense, where it otherwise would not be enforceable. Interstate Commerce Commission v. Delaware, L. & W. R. R., 64 Fed. 723, 5 Int. Com. Rep. 146 (1894). And where the order of the Commission is based on an erroneous construction of the statute, by reason of which error it has declined adequately to find the facts, the courts will not proceed to an original investigation of the facts which should have been passed upon by the Commission, but will correct the error of law committed by that body, and, after doing so, dismiss the application without prejudice to the right of the Commission to make a further investigation of the facts. The defendant is entitled to have its defense considered, in the first instance at least, by the Commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, are questions of fact, to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence; and it did not comport with the true scheme of the statute that the courts should undertake to find and pass upon such questions of fact on appeal. East Tennessee, V. & G. Ry. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516 (1901).

So where the Commission has made an order upon one ground, the courts may enforce the order upon another ground. The courts are not confined to the ground alleged by the Commission. If a court finds that the forbidden practice of the carrier is in itself for any reason illegal as a violation of the act, the order might be valid and be a lawful order, although the Commission gave a wrong reason for making it. If it held the practice to be a violation of one section, the order to desist might be valid if, instead of the section named by the Commission, the court should find that the practice was a violation of another section of the act. All the facts being brought out before the Commission or the court, the court could decide whether the order was a lawful one, without being confined to the reasons stated by the Commission. Southern Pacific Co. v. Interstate Commerce Commission, 200 U. S. 536, 26 Sup. Ct. 330 (1906).

TITLE II.

State Statutes Affecting Rates.

CHAPTER XXXVI.

STATE STATUTES AGAINST EXTORTIONATE RATES.

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§ 1100. Introduction.

In this chapter are collected representative extracts from State statutes against the charging of extortionate rates by common carriers. It is, of course, universal common law that a common carrier shall not demand unreasonable prices; and in so far as these statutes reiterate this principle, they are simply declaratory of the common law. The chief object of these clauses is to provide more adequate methods for the enforcement of this law. Thus it is not uncommon to provide for the imposition of a penalty for extortion, sometimes a very heavy one, and in some States an increasing one for successive offenses. More common still is the provision giving to the injured party the right to recover double or treble damages, and, in addition, usually, his reasonable attorney's fees.

§ 1101. **Alabama.**

Any person or corporation engaged in the business of transporting passengers or freights over any railroad in this State, who shall exact and receive for such transportation more than just compensation therefor, or demands more than the rates specified in any bill of lading issued for such freights, or who, for his own advantage, or for the advantage of any connecting line, or of any person or locality, shall make any unjust discrimination in such transportation, against any individual, corporation, or locality, such overcharge or discrimination to be determined by the jury, is guilty of extortion, and is liable to the party injured for double the damages sustained. [Civil Code (1896), section 3460]. In such suit, the fact that the rates or terms, in respect to which the extortion is alleged, had been previously approved by the railroad commissioners is *prima facie* evidence that the same were not extortionate; nor shall any rate or charge for the transportation of freight over any railroad be held or considered extortionate or excessive, if in the absence of any unjust discrimination, it appears from the evidence that the net earnings of such railroad for transporting freights on the basis of such rate or charge, together with the net earnings thereof from its passengers and other traffic does not amount to more than a fair and just return on the value of such railroad, its appurtenances and equipments. [Ibid, section 3461.]

See Mobile & O. R. R. v. Dismukes, 94 Ala. 131 (1891), pointing out that these sections cannot apply to interstate commerce.

§ 1102. **Arkansas.**

Sec. 6309. All charges made for any service rendered, or to be rendered, in the transportation of passengers or property on any railroad in this State, or in connection therewith, or for the receiving, delivering, or storage, or handling of such property, shall be reasonable and just, and every unjust and

unreasonable charge for such service is prohibited and declared to be unlawful. [Digest Statutes (1894), section 6309.]

Sec. 6191. The legislature may, when any such railroad shall be opened for use, from time to time, alter or reduce the rates of toll, fare, freight, or other profits upon such road, but the same shall not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per centum on the capital actually paid in, nor unless, on an examination of the amounts received and expended, to be made by the Secretary of State, he shall ascertain that the net income divided by the company from all sources for the year then last past shall have exceeded an annual income of fifteen per cent. upon the capital of the corporation actually paid in. [Ibid, section 6191.]

The standard of reasonableness is discussed in St. Louis & S. F. Ry. v. Gree, 54 Ark. 101, 15 S. W. 18 (1895).

§ 1103. **Florida.**

From and after the taking effect of this Act, if any railroad, railroad company, or common carrier, organized, or that may be hereafter organized, or exist, in this State under any act of incorporation or general law of this State now in force, or which may hereafter be enacted, or any railroad, railroad company, or common carrier, organized, or which may be hereafter organized under the laws of any other State, and doing business in this State, shall charge, collect, demand or receive more than a fair or reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its tracks, or any of the branches thereof, or upon any railroad within this State which it has the right, license or permission to use, operate or control; the same upon conviction thereof shall be dealt with as hereinafter provided for. [Laws of 1899 (No. 39), ch. 4700, section 3.]

§ 1104. **Georgia.**

That from and after the passage of this Act, if any railroad corporation organized or doing business in this State under any Act of incorporation or general law of this State now in force, or which may hereafter be enacted, or any railroad corporation organized, or which may hereafter be organized under the laws of any other State and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad cars upon the track or any branches thereof, or upon any railroad within this State which it has the right, licenses or permission to use, operate or control, the same shall be deemed guilty of extortion, and upon conviction thereof shall be dealt with as hereinafter provided. [Acts of 1878-79, No. 269, section iii.]

A written contract of affreightment stipulated that if the goods were loaded in a box car the rate should be so much per 100 pounds actual weight, and if loaded on a flat car so much per 100 pounds for 10,000 pounds. The actual weight of the consignment was 1,550 pounds, and the carrier loaded a part in a box car and part on a flat car, in a way to make the freight more than it would have been if the whole consignment had been loaded on either car. It was held that this was an overcharge, and that plaintiff, after paying the whole charge and complying with Civ. Code, § 2316, was entitled to recover the overcharge and the penalty prescribed by said act. Stewart v. Comer, 100 Ga. 754, 28 S. E. 461 (1897).

§ 1105. **Illinois.**

If any railroad corporation, organized or doing business in this State under any Act of incorporation, or general law of this State, now in force or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other State, and doing business in this State shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation, for the

transportation of passengers or freight, of any description, or for the use and transportation of any railroad car upon its track, or any of the branches thereof, or upon any railroad within this State which it has the right, license or permission to use, operate or control, the same shall be deemed guilty of extortion and upon conviction thereof shall be dealt with as hereinafter provided. [Annotated Statutes (1896) ch. 114, ¶ 167.]

This provision is constitutional. Chicago, B. & Q. R. R. v. Jones, 149 Ill. 361, 37 N. E. 247 (1894). It will be enforced in all proper cases. St. Louis, A. & T. H. R. R. v. Hill, 14 Ill. App. 579 (1884). But there is no extortion when the rates fixed by the Commission are not exceeded. Chicago, B. & Q. R. R. v. People, 77 Ill. 443 (1875). And extortion must be shown. Illinois & St. L. R. R. v. Beaird, 24 Ill. App. 322 (1888).

§ 1106. Iowa.

All charges made for any service rendered or to be rendered in the transportation of passengers or property in this State, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. [Code (1897) section 2123.]

The rates fixed by the Commissioners are, both as to the shipper and carrier, only presumptively reasonable, and if such Commissioners' rates are in fact excessive, such overcharges may be recovered by the shipper. Barrie v. Chicago, B. & Q. R. R., 102 Iowa, 278, 71 N. W. 339 (1897).

The law requires reasonable rates, and the defendant may show that the rate fixed by the Commission is unreasonable. The *prima facie* evidence that it is reasonable will not prevail when it is shown that it is in fact not so. Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 48 N. W. 98 (1892).

§ 1107. Kansas.

No railroad company shall charge, demand or receive from any person, company or corporation an unreasonable price for the transportation of persons and property, or for the hauling or storing of freight, or for the use of its cars, or for any priv-

ilege of its service afforded by it in the transaction of its business as a railroad company; and upon complaint in writing made to the Board of Railroad Commissioners that an unreasonable price has been charged, such board shall investigate said complaint, and, if sustained, shall make a certificate under their seal setting forth what is a reasonable charge for the service rendered, which shall be *prima facie* evidence of the matter therein stated. [General Laws (1901) section 5981.]

§ 1108. **Kentucky.**

If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its tracks or upon any track it has control of, or the right to use in this State, it shall be guilty of extortion. [Compiled Statutes (1894), section 816.]

The validity of this section was questioned in Louisville & N. R. R. v. Com., 99 Ky. 132, 35 S. W. 129 (1897). But see McChord v. Louisville & N. R. R., 183 U. S. 483, 46 L. Ed. 289, 22 Sup. Ct. 165 (1901), overruling Louisville & N. Ry. v. McChord, 103 Fed. 216 (1900).

§ 1109. **Massachusetts.**

A railroad corporation may establish for its sole benefit, fares, tolls and charges upon all passengers and property conveyed or transported on its railroad, at such rates as may be determined by its directors, and may from time to time by its directors regulate the use of its road, but such fares, tolls and charges, and such regulations, shall at all times be subject to revision and alteration by the general court or by such officers or persons as it may appoint for the purpose, anything in the charter of a railroad corporation to the contrary notwithstanding. [Revised Laws (1902) ch. 111, sec. 225.]

§ 1110. **Minnesota.**

All charges made by any such carrier for the transportation of passengers or property whether over one or more railroads,

or in connection therewith, or for the receiving, delivering, storage or handling of such property shall be equal and reasonable, and every unequal or unreasonable charge for such service is prohibited. One car-load of freight of any kind or class shall be transported at as low a rate per ton, and per ton mile, as any greater number of carloads of the same kind and class from and to the same points of origination and declaration. [Revised Laws (1905), section 2007.]

§ 1111. **Mississippi.**

The track of every railroad which carries persons or property for hire, is a public highway, over which all persons have equal rights of transportation for themselves and their property, and for passengers, freight and cars, on the payment of reasonable compensation to the railroad for such transportation; and if any railroad corporation, or person managing a railroad, shall demand and receive more than reasonable compensation for the services rendered in transportation of passengers or freight, or more than allowed by the tariff of rates fixed by the Commission, or by such person or corporation with its approval, or more than the rate specified in a bill of lading issued by authority of the railroad. Such person or corporation, in either case, shall be guilty of extortion, and may be punished therefor criminally, besides being liable civilly. [Annotated Code (1902), section 4287.]

§ 1112. **Missouri.**

All railways heretofore constructed or that may hereafter be constructed in this State, are hereby declared to be public highways, and all individuals, companies, corporations, trustees, receivers and lessees running and operating cars and trains upon such railways, for the transportation of freight and passengers upon such railways, are hereby declared to be common carriers. All charges made for any services rendered in the transportation of freight on such railways, including the receiving, deliv-

ering, storing and handling of such property, shall be reasonable and just; and all unreasonable and unjust charges for such service are prohibited and declared unlawful. [Revised Statutes (1899) section 1128.]

§ 1113. **New York.**

The legislature may when any such railroad shall be open for use, from time to time, alter or reduce the rate of freight, fare or other profits upon such road; but the same shall not, without the consent of the corporation, be so reduced as to produce with such profits less than ten per centum per annum on the capital actually expended, nor unless on an examination of the amounts received and expended, to be made by the board of railroad commissioners, they shall ascertain that the net income derived by the corporation from all sources, for the year then last past shall have exceeded an annual income of ten per centum upon the capital of the corporation actually expended. [Birdseye (3d ed.) vol. III, p. 2942, § 38.]

§ 1114. **South Carolina.**

That from and after the passage of this Act, if any railroad doing business in this State, or any such company organized under the laws of any other State and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate or toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track or any of the branches thereof or upon any railroad in this State which has the right, license or permission to use, operate or control the same, [it] shall be deemed guilty of extortion, and upon conviction thereof shall be fined not less than five hundred nor more than five thousand dollars. [Laws of 1899, ch. 164, section 12.]

The standard of reasonableness is discussed in Matthews v. Board of Corp. Commrs., 106 Fed. 7 (1901).

§ 1115. **North Dakota.**

All charges made for any service rendered or to be rendered by any railroad, railroad corporation or common carrier, subject to the provisions of this act in the transportation of passengers or property in this State as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. [Laws of 1897, chap. 115, sec. 6.]

§ 1116. **South Carolina.**

If any railroad corporation, organized or doing business in this State, under the act of corporation, or general law of this State now of force, or which may hereafter be enacted, or any railroad corporation organized, or which may hereafter be organized, under the laws of any other State, and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its tracks, or any of its branches, or upon any railroad within this State which it has the right, license or permission to use, operate or control, the same shall be deemed guilty of extortion, and upon conviction thereof shall be fined in a sum not less than one hundred nor more than one thousand dollars. [Civil Code (1902), sec. 2083.]

§ 1117. **Tennessee.**

If any railroad corporation shall charge, collect, or receive more than a just or reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of or the right to use in this State, it shall be deemed guilty of extortion, which is hereby prohibited and declared unlawful. [Laws of 1897, chap. 10, sec. 16.]

§ 1118. **Texas.**

If any railroad company, subject to this chapter, or its agent or officer, shall hereafter charge, collect, demand or receive

from any person, company, firm or corporation a greater rate, charge or compensation than that fixed and established by the Railroad Commission for the transportation of freight, passengers, or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its said agent and officer shall be deemed guilty of extortion and shall forfeit and pay to the State of Texas a sum not less than $100 nor more than $5,000. [Revised Statutes (1895), art. 4573.]

In Wright v. Howe (Tex. Civ. App.), 24 S. W. 314, it was held that these sections against railroad companies for overcharges and unjust discrimination in the shipment of freight, have no application to interstate commerce.

§ 1119. **Vermont.**

A railroad corporation may establish for its sole benefit a toll upon all passengers and property carried by it at such rates as are determined by the directors of the corporation; and may regulate such conveyance and transportation, the weight of loads, and other things in relation to the use of the road as the directors determine. The Supreme Court, at any term thereof, on application in writing of three or more freeholders of the State, and due notice thereof to any person or corporation operating the railroad complained of, may from time to time, upon hearing before said court or upon report of three commissioners appointed by said court for that purpose, alter or reduce the toll of any railroad operated in this State. [General Statutes (1894), section 3896.]

If the application is granted, the court shall make an order fixing the rates of toll and render judgment for the applicants to recover their costs, and in addition thereto such damages as the court deems just. Any person or persons refusing to perform the order of the court in the premises shall be in contempt, and the Supreme Court shall have full chancery powers for the enforcement of any order, judgment or decree under this section. [Ibid, section 3897.]

§ 1120. **West Virginia.**

Railroads heretofore or hereafter constructed in this State are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as now are, or may be, prescribed by law; but nothing in this section contained shall be construed to exempt any person from the payment of the lawful charges for such transportation. [Code of 1899, ch. 54, section 71.]

Code provision imposing a penalty of $500 upon railroads for overcharge in freight or passenger rates, does not apply to an overcharge by a conductor in violation of the company's rates and rules, which the company is not shown to have ratified. Hall v. Norfolk & W. R. Co., 44 W. Va. 36, 28 S. E. 754 (1897).

§ 1121. **Wisconsin.**

Every railroad is hereby required to furnish reasonably adequate service and facilities, and the charges made for any service rendered or to be rendered in the transportation of passengers or property or for any service in connection therewith, or for the receiving, switching, delivering, storing or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. [Laws 1905, ch. 362, section 3.]

§ 1122. **Conclusion.**

The temper of the public in regard to unjustifiable charges by railway companies is well shown by these extracts from various statutes of the various States. Such extortion is regarded as more dangerous to the well being of society than many crimes. At the same time those States are to be commended which provide guides for the conduct of the common carrier, setting maximum rates either by legislation or through commissions; for it is generally held, as it plainly ought to be, that in charging no more than such rates the carrier will not be guilty of extortion.

CHAPTER XXXVII.

STATE STATUTES AGAINST PERSONAL DISCRIMINATION.

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§ 1131. Introduction.

It was seen in a former portion of this book when the common law principles for the prevention of discrimination were under discussion that the American States were divided into two substantially equal groups upon the question whether there was any common law against discrimination as such. That equality no longer remains; for in most of the jurisdictions where the courts were hesitant about declaring that the common law had developed a rule against discrimination by its own processes, the legislatures have stepped in with positive prohibitions against discriminations of all sorts. And in those jurisdictions which had already held that most discrimination was contrary to common law principles, the common law was reinforced by detailed reiteration.

§ 1132. **Alabama.**

3462. Every person or corporation owning or operating a railroad in this State, must publish, by posting at all the freight depots along the line of such railroad, the tariffs or rates for the transportation of freight thereon, showing rates for each class, and including general and special rates; and from such tariffs no reduction shall be made in favor of any person which is not also made in favor of all other persons or corporations by change in such published rates. Special rates, if so published, may be given to any person or corporation to aid in any industrial enterprise in this State. [Civil Code (1896), sec. 3462.]

Nothing in this code shall be construed as to prevent any person or corporation owning or operating a railroad from transporting freight or passengers free of charge. [Ibid, 3463.]

All discrimination is illegal that is not based upon difference in the cost of service. Lotspeich v. Central Ry. & B. Co., 73 Ala. 306 (1882). And although reductions may by statutory proviso be made to aid industrial enterprises, they ought to be made without discrimination. Louisville & N. Ry. v. Fulgham, 91 Ala. 555, 8 So. 803 (1890).

§ 1133. **Arkansas.**

All individuals, associations and corporations shall have equal rights to have persons and property transported over railroads in this State, and no unjust or undue discrimination shall be made in charges for, or in facilities for transportation of freight or passengers within the State. . . . But excursion, immigration and commutation tickets may be issued at special rates. [Digest of Statutes (1894), sec. 6301.]

§ 1134. **California.**

No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons or in the facilities for the transportation of the same classes of freight or passengers within this State, or coming from or going to any other State.

. . . Excursion and commutation tickets may be issued at special rates. [Constitution(1880), Art. XII, sec. 21.]

§ 1135. **Delaware.**

No railroad or railway corporation organized under this Act shall charge, demand, or receive from any person, company, or corporation for the transportation of passengers or property a greater sum than it shall charge or receive from any other person, company or corporation for like service, from the same place, under like conditions, under similar circumstances, and for the same period of time. For every violation of the provision of this section such corporation shall be liable to the party suffering thereby in double the entire amount so charged to such party, to be recovered before any court having jurisdiction thereof, provided, however, that nothing in this section shall be construed to prohibit the carriage or handling of persons or property free or at reduced rates for the United States, State or municipal governments, or to or from fairs and expositions for exhibitions thereof; or the free carriage of destitute and homeless persons transported by charitable societies and the necessary agents employed in such transportation; or the issuance of mileage, excursion or commutation passenger tickets; nor to prohibit any such corporation from giving reduced passenger rates to ministers of religion solely engaged in ministerial duties or to the United States, State or municipal governments; nor to prohibit any such corporation from giving free carriage to their own officers and employees; or to prevent the principal officers of any such corporation from exchanging passes or tickets with other railroad corporations for their officers and employees; nor to prohibit any such corporation from giving reduced rates of transportation to other railroad corporations for railroad construction, material, equipment, or supplies. [Laws of 1901, section 97.]

§ 1136. Florida.

That if any railroad, railroad company or other common carrier as aforesaid, shall make any unjust discriminations in its rates or charges of toll, or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon any railroad, or upon any of the branches thereof, or upon any railroad or steamship lines connected therewith, which it has a right, license or permission to operate, use or control within this State, the same shall be guilty of violating the provisions of this Act, and upon conviction thereof, shall be dealt with as hereinafter provided. [Laws of 1899 (No. 39), ch. 4700, section 4.]

Nothing in this act shall prevent the common carrier subject thereto from the carriage, storage or handling of property free or at reduced rates for charitable purposes, or to or from fairs or expositions for exhibition thereat, or free carriage of destitute or homeless persons transported by charitable societies and the necessary agents employed in such transportation, or the issuance of mileage, excursion or commutation or round trip passenger tickets, or from giving reduced rates to ministers of religion, or from giving free passes to their own officers or employees, and their immediate families dependent upon them, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees or free passes or reduced rates to persons in charge of live stock shipped from point of shipment to destination and return, or from issuing second-class tickets at a lower rate of fare, than for first-class, for the holders of which second-class tickets so issued only second-class accommodations shall be allowed. [Ibid, section 19.]

Formerly, as may be seen in Johnson v. Pensacola & P. R. R., 16 Fla. 623. 26 Am. Rep. 731 (1878), discrimination was not held illegal in itself in Florida unless the party discriminated against was treated outrageously.

§ 1137. **Georgia.**

If any railroad corporation as aforesaid shall make any unjust discrimination in its rates or charges of toll for the transportation of passengers, or freight of any description, or for the use and transportation of any railroad car on its said road, or upon any of the branches thereof, or upon any railroads connected therewith within this State the same shall be deemed guilty of having violated the provisions of this Article, and upon conviction thereof shall be dealt with as hereinafter provided. [Code (1895), section 2188.]

Personal discrimination is forbidden in Georgia both by common law and by statute. See Logan v. Central Ry. & B. Co., 74 Ga. 684 (1885), and Savannah F. & W. Ry. v. Burdick, 94 Ga. 775, 21 S. E. 995 (1894).

§ 1138. **Illinois.**

If any such railroad corporation aforesaid shall make any unjust discrimination in its rates or charges of toll, or compensation, for the transportation of passengers, or freight of any description, or for the use and transportation of any railroad cars upon its said road, or upon any of the branches thereof, or upon any railroads connected therewith, which it has the right, license or permission to operate, control or use, within this State, the same shall be deemed guilty of having violated the provisions of this act, and upon conviction thereof shall be dealt with as hereinafter provided.

Provided, however, that nothing herein contained shall be so construed as to prevent railroad corporations from issuing commutation, excursion or thousand-mile tickets, as the same are now issued by such corporations. [Annotated Statutes (1896), ch. 114, section 167.]

Personal discrimination is contrary to the law of Illinois, both common and statutory. Chicago & A. R. R. v. People, 67 Ill. 16, 16 Am. Rep. 599 (1873); People v. Chicago & A. R. R., 67 Ill. 118 (1873). Differences in the cost of service may, however, be taken into account. Chicago & A. R. R. v. Coal Co., 79 Ill. 121 (1875); Savitz v. Ohio & M. Ry., 150 Ill. 208, 37 N. E. 235, 27 L. R. A. 626 (1894), affirming 49 Ill. App. 315 (1892).

§ 1139. Indiana.

If any railroad subject hereto, directly or indirectly, or by any special rate, rebate, drawback, or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited.

That nothing in this Act shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, state or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion or commutation passenger tickets. Nothing in this act shall be construed to prohibit any common carrier from giving free passes or tickets to officers and employees of Young Men's Christian Associations, reduced rates to ministers of religion or to municipal governments for the transportation of indigent persons, or to the inmates of the National Home or State Home for disabled volunteer soldiers, and of soldiers' and sailors' orphans' homes, including those about to enter and those returning home after discharge, under arrangements with the board of managers of said homes. Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any other railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees. [Laws of 1905, ch. 53, section 14.]

Louisville, E. & St. L. R. R. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105 & N. (1892), was a case where the railroad made a rate on

railroad ties to one shipper about 50 per cent. less than the rate to other shippers. It was held that this could not be justified by showing that the favored shipper had agreed to sell to the railroad such ties as it might want.

§ 1140. Iowa.

If any common carrier subject to the provisions of this chapter shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like contemporaneous service in the transportation of a like kind of traffic, such common carrier shall be guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful; but this section shall not be construed as prohibiting a less rate per one hundred pounds in a car-load lot than is charged, collected or received for the same kind of freight in less than a car-load lot. [Code (1897), section 2124.]

Formerly the courts of Iowa were not opposed to various forms of discrimination as such. Cook v. Chicago, R. I. & P. Ry., 81 Iowa, 551, 46 N. W. 749, 25 Am. St. Rep. 512, 9 L. R. A. 764 (1890); Paxton v. Illinois Central R. R., 56 Iowa, 427, 9 N. W. 334 (1880). But this statute is so positive that it plainly reaches all forms of personal discrimination; the only question can be as to the details of its enforcement. In Blair v. Sioux C. & P. Ry., 109 Iowa, 369, 80 N. W. 673 (1899), it was held that interest is not recoverable on the treble damages imposed by the statute as a penalty for unjust discrimination in charges by a railroad company; and in Carrier v. Chicago, R. I. & P. R. R., 79 Iowa, 80, 44 N. W. 203 (1889), it was held that a cause of action to recover unreasonable and excessive charges accrued when the charges were paid and not when the discrimination was discovered; but where the company had fraudulently concealed the fact that the amount paid by plaintiff was unreasonable and in excess of that paid by other shippers, that the statute of limitations did not begin to run until the fact was discovered.

§ 1141. **Kansas.**

No railroad company shall charge, demand or receive from any person, company or corporation, for the transportation of any property, or for any other service, a greater or less sum than it shall at the same time charge, demand or receive from any other person, company or corporation for a like service from the same place, or upon like conditions and under similar circumstances; and all concessions of rates, drawbacks and contracts for special rates shall be open to and allowed all persons, companies and corporations alike. [General Statutes (1901), section 5985.]

Nothing herein or in the act to which this is supplemental shall prevent the carriage, storage or handling of freight free or at reduced rates for the State, or for city, county or town government, or for charitable purposes, or to and from fairs and expositions for exhibition thereof, or the free carriage of destitute and indigent persons, or the issuance of mileage or excursion passenger tickets; nor to prevent railroads from giving special rates or free transportation to the officers and members of the Kansas national guard, to ministers of religion, inmates of hospitals, eleemosynary, or charitable institutions, or to any railroad officers, agents, employees, attorneys, witnesses attending court or before the commissioners on behalf of such railroad company, stockholders or directors. [Laws of 1905, ch. 340, section 12.]

§ 1142. **Kentucky.**

If any corporation engaged in operating a railroad in this State shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects or receives from any person for doing for him a like and contemporaneous service in the transporta-

tion of a like kind of traffic, it shall be deemed guilty of unjust discrimination. [Compiled Statutes (1894), section 817.]

It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage. When one or more carloads of freight shall be transported at the same time for different persons, and for each shipper a car load or more, such shipment shall be considered and taken as the same quantity of freight within the meaning of this law, and when less than a carload of freight, and over five thousand pounds, are transported at the same time for different shippers, and for each shipper over five thousand pounds, such shipment shall be considered and taken as the same quantity of freight, and when over five hundred pounds and less than five thousand pounds are transported at the same time for different shippers, and for each shipper said quantity of freight, such shipment shall be considered and taken as the same quantity of freight. [Ibid, section 818.]

In Louisville & N. R. R. v. Com., 46 S. W. (Ky.) 702 (1898), it was held that the requirement that the charges shall be the same for receiving, transporting and handling freight of the same class from and to the same points, "and upon the same conditions," relates to the receiving, loading, unloading transporting, hauling, delivering and handling freight, and requires the charges therefor to be the same for all persons alike, except when the freight is transported from and to different points, or is of different classes, or the cost of transporting, including savings by reason of facilities furnished by the shipper is different. And in Com. v. Chesapeake & O. Ry., 115 Ky. 57, 72 S. W. 361 (1903), it was held that an indictment against a carrier for discrimination must allege the hauling was under the same conditions. So there cannot be a violation of the law unless different charges be made for transporting freight of the same class from and to the same points and "upon the same conditions." Louisville & N. Ry. v. Com., 105 Ky. 179, 48 S. W. 416 (1902). And an indictment for unjust discrimination in rates should particularly set forth the points

from and to which the goods were shipped and the character of the service required in each case. Louisville & N. Ry. v. Com., 108 Ky. 628, 57 S. W. 508 (1900).

§ 1143. **Louisiana.**

. . . To correct abuses, and prevent unjust discrimination and extortion in the rates for the same, on different railroads, steamboats and other water craft, sleeping car, express, telephone and telegraph lines of this State. . . [Constitution (1898), article 284.]

§ 1144. **Massachusetts.**

A railroad corporation shall not in its charges for the transportation of freight or in doing its freight business, make or give any undue or unreasonable preference or advantage to or in favor of any person, firm or corporation, nor subject any person, firm or corporation to any undue or unreasonable prejudice or disadvantage. [Revised Laws (1902), ch. 111, section 245.]

The common law of Massachusetts did not hold discrimination, as such, illegal. Fitchburg R. R. v. Gage, 12 Gray, 393, B. & W. 354 (1859).

§ 1145. **Michigan.**

All railroad corporations shall grant equal facilities for the transportation of passengers and freight to all persons, companies, or corporations, without discrimination in favor of any individuals, companies or corporations. No railroad corporation shall in any manner discriminate in its rates of freight tariff, in favor of any individual, company, or corporation doing business over its line [of] road, and shall grant the same rights and privileges to all shippers, subject to the same rates and classification, without rebate or any other special privilege or rate not extended to all other shippers in the same class, who ship a like quantity or quantities. Any railroad corporation refusing to comply with any one of the provisions of this section shall be liable to a penalty not exceeding five hundred dollars. [Compiled Laws (1897), section 6266.]

§ 1146. **Minnesota.**

It shall be unlawful for any common carrier to make or give any unequal or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatever; or to subject any particular person, company, firm, corporation or locality to any unequal or unreasonable prejudice in any respect whatsoever. [Revised Laws (1905), section 2009.]

Nothing in this chapter shall prevent the handling free or at reduced rates for the United States, the State, or for any municipal corporation thereof, or for charitable purposes; or the issuance of mileage, excursion or commutation passenger tickets at rates equal to all; or giving such reduced rates to ministers of religion, sisters of charity, missionaries, students of any educational, or inmates of any charitable institution; nor the free transportation of passengers when allowed by law. [Ibid, section 2010.]

§ 1147. **Mississippi.**

It is unlawful for any railroad to make or allow any rebate or reduction from the tariffs of charges fixed or approved by the Commission, in favor of any person, place or corporation, by a change in or deviation from the rates so fixed or approved, unless such change or deviation be first allowed by the Commission; and it is unlawful for any railroad to grant free passes or tickets, or passes or tickets at reduced rates, to any person, or to transport or suffer any person to be transported free of charge, or at reduced rates not applicable to all persons alike; but this shall not prevent the transportation free of charge, or at reduced rates, of persons and freight for a scientific, religious or benevolent purpose, or for an industrial exhibition, fair or association of a public nature, nor such transportation of immigrants, persons traveling with a view of locating immigrants, and indigent and unfortunate persons, nor shall it prevent the

sale and issuance of mileage, excursion and commutation tickets, nor the free carriage of the railroad's own officers, and of persons *bona fide* in its employment, at a salary or regular compensation, nor the exchange of passes or tickets with the other railroads for their officers and employees, nor its free carriage of the class of persons known as railroad employees, of persons injured in railroad accidents, and of the physicians and nurses attendant upon such injured persons, nor the carriage free, or at reduced rates, of the members of the families of officers and employees of the railroad; however, these exceptions are allowed on the condition that the railroad shall report annually to the Commission all free passes granted, to whom, and for what reason granted. [Annotated Code (1902), section 4292.]

§ 1148. **Missouri.**

If any such common carrier shall directly or indirectly, by any special rate, rebate, drawback or other devices, charge, demand, collect or receive from any person or persons, firm or corporation a greater or less compensation for any service rendered in the transportation of any kind of property upon such railroad in this State than it charges, demands, collects or receives from any other person or persons, firm or corporation for doing for him or them a like service in the transportation of a like kind of property under substantially like circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful. [Revised Statutes (1899), section 1129.]

In Christie v. Missouri Pac. Ry., 94 Mo. 453, 7 S. W. 567 (1888), it was held under a former condition of the law that discrimination was not proved unless it was shown that the reduced rate was not given to all. And in Rothschild v. Wabash St. L. & P. R. R., 92 Mo. 91, 4 S. W. 413 (1887), it was held that if circumstances appeared to explain the lower rate given to a particular shipper the *prima facie* discrimination would be obviated. But these decisions may not be acceptable to the courts in the interpretation of the statute quoted above.

§ 1149. **Nebraska.**

That if any common carrier subject to the provisions of this act shall directly or indirectly by any special rate, rebate, drawback or other device, charge, demand, collect, or receive from any person or persons a greater compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. [Compiled Statutes (1889), section 4046.]

§ 1150. **New Hampshire.**

The proprietors of every railroad shall furnish to all persons reasonable and equal terms, facilities, and accommodations for the transportation of persons and property over their railroad, and for the use of depots, buildings and grounds in connection with such transportation, and for the interchange of such traffic at points in connection with other railroads. [General Laws (1903), ch. 160, section 1.]

If the proprietors of any railroad shall not comply with the provisions of the preceding section, they shall be fined not exceeding one thousand dollars, for each offense, and shall be liable to the party injured for his damages in an action on the case. [Ibid, section 2.]

The proprietors of every railroad shall cause to be posted in their depots a table of prices for the conveyance of persons and property between the stations on their road and between such stations and the stations of other railroads with which they have a business connection. The rates shall be the same for all persons and for like descriptions of freight between the same

points, and shall not be raised until after thirty days' notice posted as aforesaid. [Ibid, section 3.]

Season and mileage tickets may be sold at reduced rates; and special rates may be established for passengers to attend agricultural fairs and public meetings, for parties of pleasure, and for military and other organized bodies. [Ibid, section 4.]

Discrimination is defined in McDuffee v. Portland & R. R. R., 52 N. H. 430, 13 Am. Rep. 72 (1873), as a personal difference made without justification. But in Concord & P. R. R. v. Forsaith, 59 N. H. 122, 47 Am. Rep. 181 (1879), it was held that the fact that one shipper made large shipments was sufficient to justify a difference in rates.

§ 1151. **New Mexico.**

No railroad company shall charge any person, company or corporation for the transportation of any property, a greater sum than it shall at the same time charge and collect from any other person, company, or corporation for a like service from the same place, and upon like conditions, and all concessions of rates, drawbacks, and contracts for special rates founded upon the demands of commerce and transportaton shall be open to all persons, companies, and corporations alike. [Compiled Laws (1897), section 3911.]

§ 1152. **North Carolina.**

That if any common carrier subject to the provisions of this Act shall directly or indirectly by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this Act than it charges, demands, or collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust dis-

crimination, which is hereby prohibited and declared to be unlawful. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and any person, persons, company, or corporation violating the provisions of this section shall be upon conviction thereof, fined not less than one thousand nor more than five thousand dollars for each and every offense. [Laws of 1899, ch. 164, section 13.]

Provided further, that the North Carolina Corporation Commission conjointly with such companies shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and internal improvements in the State; *Provided further,* that nothing in this Act shall prohibit railroad or steamboat companies from making special passenger rates with excursion or other parties, also rates on such freights as are necessary for the comfort of such parties, subject to the approval of the Commission. [Ibid, section 14.]

See State v. Southern Ry., 122 N. C. 1052, 30 S. E. 133 (1898), where it was held that under a provision that no common carrier shall receive from any person any greater compensation than it charges any other person for a like and contemporaneous service, it is unlawful for a railroad company to issue passes, and transport people thereon free of charge. And see McNeill v. Dunham & C. Ry., 135 N. C. 682, 47 S. E. 765 (1904), where it was held that a passenger riding upon a pass granted in violation of a provision of this sort was not so in *pari delicto* as to disable him from recovering for negligent injuries.

§ 1153. North Dakota.

If any railroad, railroad corporation or common carrier subject to the provisions of this Act shall directly or indirectly by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in

the transportation of passengers or property subject to the provisions of this Act than it charges, demands, collects, or receives from any other person or persons for doing for him or for them a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination which is hereby prohibited and declared unlawful; this section, however, is not to be construed as prohibiting a less rate per one hundred pounds in a carload lot than is charged, collected, or received from the same kind of freight in less than a carload lot. [Laws of 1897, ch. 115, section 15.]

§ 1154. Ohio.

It shall be the duty of all railroad companies and of all persons operating a railroad to secure and extend to all persons, companies and corporations, the same and equal opportunities and facilities for receiving and shipping freights of all kinds, of the same class [and the same and equal opportunities and facilities for receiving and shipping freights of all kinds of the same class], that such railroad company or the person operating such railroad, extends to, has used or enjoys, of and concerning freights owned by such railroad company, or the person operating such road or any of the officers or stockholders therein, or in which it, they or either of them have any interest, and any railroad company or person operating any railroad failing to comply with or observe the provisions or requirements of this section, shall be liable in a civil action to the party injured for the damages sustained, but for any violation of this section the recovery in any such action shall be not less than five hundred dollars. Annotated Statutes (1906), section 3373.]

Ohio has always been one of the strongest States against personal discrimination; and this statute, in so far as it states substantive law, is but declaratory of the common law; therefore it is thought advisable to subjoin citations to the principal decisions against personal discrimination. In Schofield v. L. S. & M. S. R. R., 43 Ohio St. 571, 3 N. W. 907,

54 Am. Rep. 846 (1885), it was held illegal to make a reduction to one shipper of a commodity, even though he was a large shipper. This was reiterated in Bundred v. Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589 (1892).

§ 1155. Oregon.

It shall be unlawful for any person or persons engaged in the transportation of property as aforesaid, directly or indirectly, to allow any rebate, drawback, or other advantage, in any form, upon shipments made or services rendered as aforesaid by him or them; *provided,* that the provisions of this Act shall not apply to goods intended in good faith to be shipped to points beyond the limits of this State; *provided,* that this dicrimination shall be considered only as between persons when relating to similar grades of freight. [Anotated Laws (1892), section 4030.]

§ 1156. Pennsylvania.

Any undue or unreasonable discrimination by any railroad company, or other common carrier, or any officer, superintendent, manager or agent thereof, in charges for, or in facilities for, the transportation of freight, within this State, or coming from or going to any other State, is hereby declared to be unlawful. [Br. Pur. Dig. (1894), p. 1815, section 186.]

In Bald Eagle V. Ry. v. Nittarey V. Ry., 171 Pa. St. 284, 33 Atl. 239 (1895), it was held that one who promised a railroad company, in consideration of its laying its rails to his manufactory, and furnishing him money to aid in bringing the raw material thereto, to give the company the transportation of the manufactured product to market at reasonable rates, could not avoid the contract on the ground that it deprived him of rights guaranteed by Constitution, article 17, § 3, declaring that all individuals shall have equal rights to transportation, without discrimination.

In Hoover v. Pennsylvania R. R., 156 Pa. St. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263, B. & W. 410 (1893), it was held that it was not discrimination to give a lower rate on coal to manufacturers than to dealers in coal.

§ 1157. South Carolina.

If any railroad corporation as aforesaid, shall make any unjust discrimination in its rate and charges of toll as compensation for transportation of passengers or freights of any description, or for the use and transportation of any railroad car upon its said road, or upon any of the branches thereof, or upon any railroads connected therewith, which it has the right, license or permission to operate or control within this State, the same shall be deemed guilty of having violated the provisions of this chapter, and, upon conviction thereof, shall be fined in a sum not less than one hundred nor more than one thousand dollars.

It shall be unlawful for any person so engaged as aforesaid, or person engaged solely in the shipment or receiving of property directly or indirectly to allow or receive any rebate, drawback, or other advantage, in any form, upon shipments made or services rendered or received by them as aforesaid. [Civil Code (1902), section 2084.]

Provided, however, That nothing herein contained shall be so construed as to prevent such person or persons so engaged as aforesaid from issuing commutation excursion or thousand-mile tickets as the same are now issued by such corporations. [Ibid, section 2085.]

Nothing in this chapter shall apply to the carriage, receiving, storing, handling, or forwarding of property carried for the United States or any State thereof, at lower rates of freight and charges than for the general public, or to the transportation of articles free, or at reduced rates of freight, for charitable purposes, or to or from public fairs and expositions for exhibit. [Ibid, section 2087.]

Discrimination was not illegal at common law in South Carolina. Ex parte Benson & Co., 18 S. C. 38, 44 Am. Rep. 564 (1882); Avinger v. So. Car. R. R., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716 (1888).

§ 1158. **South Dakota.**

If any such railroad corporation shall charge, collect, or receive for the transportation of any passenger or freight of any description upon its railroad for any distance within the State, a greater amount of toll or compensation than is at the time charged, collected, or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same railroad; or if it shall charge, collect, or receive at any point upon its railroad a higher rate of toll or compensation for receiving, handling, or delivering freight of the same class and quantity than it shall at the same time charge, collect or receive for the transportation of any passenger or freight of any description over its railroad, a greater amount as toll or compensation than shall at the same time be charged, collected or received by it for the transportation of any passenger or like quantity of freight of the same class being transported in the same direction over any portion of the same railroad of equal distance; or if it shall charge, collect, or receive from any person or persons a higher or greater amount of toll or compensation than it shall at the same time charge, collect, or receive from any other person or persons for receiving, handling or delivering freight of the same class and like quantity, at the same point upon its railroad, . . . all such discriminating rates, charges, collections, or receipt, whether made directly or by means of any rebate, drawback or other shift or evasion, shall be deemed and taken against such railroad corporation, as *prima facie* evidence of unjust discrimination. . . . *provided, however,* that nothing herein contained shall be construed as to prevent railroad corporations from issuing commutation, excursion, or thousand-mile tickets; *provided,* the same are issued alike to all applying therefor. [Laws of 1897, ch. 110, section 28.]

See Church v. Minneapolis & S. L. Ry., 14 S. D. 443, 85 N. W. 1001 (1901), holding parties to a contract violating this section in *pari delicto.*

§ 1159. **Tennessee.**

If any such common carrier shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons, firm or corporation, a greater or less compensation for any services rendered in transportation of any kind of property upon such railroads within this State than it charges, demands, collects, or receives from any other person or persons, firms, or corporations for doing for him or them a like service in the transportation of a like kind of property under substantially like circumstances and conditions, and if such common carriers make any preference between the parties aforesaid in furnishing cars or motive power for the purpose aforesaid, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful. [Laws of 1897, ch. 10, section 15.]

This Act shall not prevent any railroad company from transporting freight free of charge, or at reduced rates, for any religious, charitable or benevolent purpose, or for any industrial exposition, fair or association of a public nature, or for transporting immigrants into this State, or persons prospecting with a view of locating or bringing immigrants into this State, or for pleasure excursions. However, nothing in this Act shall be construed so as to prevent the railroads of this State from giving special rates to encourage infant manufacturing industries, and for the encouragement of any other new business or industry, or for the transportation of any perishable goods; *provided,* that such transportation shall be furnished without discrimination, and under such rules and regulations as the Commission may prescribe. [Ibid, 24.]

See Ragan & B. v. Aiken, 9 Lea (77 Tenn.) 609 (1883), for a statement of the common law of Tennessee prior to this statute, which permitted many differences to be made, most of which must be forbidden by this enactment.

§ 1160. **Texas.**

Art. 4574. If any railroad subject hereto, directly or indirectly, or by any special rate, rebate, drawback, or other device, shall charge, demand, collect, or receive from any person, firm, or corporation, a greater or less compensation for any servive rendered, or to be rendered, by it than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited. [Revised Statutes (1898), article 4574.]

Nothing herein shall prevent the carriage, storage, or handling of freight free or at reduced rates for the State, or for any city, county or town government, or for charitable purposes, or to and from fairs and expositions for exhibition thereof, or the free carriage of destitute and indigent persons, or the issuance of mileage or excursion passenger tickets; nor to prevent railroads from giving free transportation to ministers of religion, or free transportation to the inmates of hospitals, eleemosynary and charitable institutions, and to the employes of the agricultural and geological departments of this State, or to peace officers of this State; and nothing herein shall be construed to prevent railroads from giving free transportation to any railroad officers, agents, employes, attorneys, stockholders, or directors, or to the Railroad Commissioners, their Secretary, clerks, and employes herein provided for, or to any person not prohibited by law; provided, they, or either of them, shall not receive from the State mileage when such pass is used. [Revised Statutes (1895), article 4562.]

The statute does not prohibit a carrier from charging less than the maximum rates fixed by the Commission, where no discrimination appears; and where the carrier, after agreeing to carry at a reduced rate, collects the full rate, the difference may be recovered by the shipper. Wells, Fargo Exp. Co. v. Williams (Tex. Civ. App.), 71 S. W. 314.

Under an allegation that defendant railroad company unjustly discriminated against plaintiff in charging him $50 for a shipment while it charged others for similar shipments its published rate, $35, plaintiff cannot

recover for unjust discrimination, consisting in refusing plaintiff a rebate upon its established rate which it allowed others. Texas & P. Ry. Co. v. Langsdale, Tex. Civ. App., 30 S. W. 681.

Of course, these provisions cannot apply to interstate shipments. Gulf, W. T. & P. Ry. v. Barry (Tex. Civ. App.), 45 S. W. 814 (1898); Fielder v. Missouri, K. & T. Ry., 92 Tex. 176, 46 S. W. 633 (1898).

§ 1161. **Utah.**

No railroad company or other common carrier engaged in transportation of passengers or property shall charge, demand, or receive from any person, company, or corporation for the transportation of passengers or property a greater sum than it shall charge or receive from any other person, company, or corporation for like service, from the same place, under like conditions, under similar circumstances, and for the same period of time. For every transgression of the provisions of this section such common carrier shall be liable to the party suffering thereby double the entire amount so charged to such party. [Revised Statutes (1898), section 455.]

Nothing in this chapter shall be construed to prohibit the carriage or handling of property free or at reduced rates for the United States, State, or municipal governments; or to or from fairs and exposition for exhibition thereat; or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation; or the issuance of mileage, excursion, or commutation passenger tickets; nor to prohibit any common carrier from giving reduced passenger rates to ministers of religion solely engaged in ministerial duties, or to the United States, State or municipal governments; nor to prohibit railroads from giving free carriage to their own officers and employes, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes; nor to prohibit railroad companies from giving reduced rates of transportation to other railroad companies for railroad construction material, equipment or supplies. [Ibid, section 456.]

§ 1162. **Virginia.**

If any transportation company shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any corporation, person, or persons, a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other corporation, person, or persons for doing for him or them alike and contemporaneous service in the transportation of alike kind of traffic under substantially similar circumstances and conditions, such company shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. [Pollard's Code, section 1294c, as amended Acts 1904.]

§ 1163. **Wisconsin.**

If any railroad shall make or give any undue or unreasonable preference or advantage to any particualr person, firm, or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful. [Laws of 1905, ch. 362, section 23.]

It shall be unlawful for any person, firm, or corporation knowingly to accept or receive any rebate, concession, or discrimination in respect to transportation of any property wholly within this State, or for any service in connection therewith, whereby any such property shall, by any device whatsoever, be transported at a less rate than that named in the published tariffs in force as provided herein, or whereby any service or advantage is received other than is therein specified. Any person, firm, or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than fifty dollars

nor more than one thousand dollars for each offense. [Ibid., section 24.]

§ 1164. Conclusions.

The development of the law against discrimination is the most important thing in the law of common carriage during the last twenty-five years. In one way or another, by common law decisions or by specific statutes, the demand of the people has made this prohibition of personal discrimination all but universal law. Severe penalties are laid down against violations of this law; for the public temper is such that this is regarded as one of the most serious of industrial crimes. Specific details are written in these statutes to meet, so far as possible, all the shifts and evasions which the ingenuity of railroad managers and favored shippers can devise.

CHAPTER XXXVIII.

PROHIBITION OF UNDUE PREFERENCE IN STATE STATUTES.

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§ 1171. Introduction.

How thorough-going is the policy against discrimination of every sort and by every method may be judged from the variety of the statutory provisions dealing with the subject from every conceivable method of approach. Not content with a simple affirmation of the general rule against discriminations and unequalities, many of the more recent codes provide, with great detail, for the various possibilities which may arise. Significant extracts from the statutes of various States are subjoined to show this.

§ 1172. Arkansas.

All individuals, associations and corporations shall have equal rights to have persons and property transported over railroads in this State, and no unjust or undue discrimination shall

be made in charges for, or in facilities for transportation of freight within the State. [Digest of statutes (1904), section 6301.]

§ 1173. **California.**

No discrimination in charges shall be made by any railroad or other transportation line between places or persons or in the facilities for the transportation of the same classes of freight or passengers within this State, or coming from or going to any other State. [Constitution (1880), article xii, section 21.]

§ 1174. **Connecticut.**

Every railroad company which refuses to transport milk for any person, on the same train and on the same conditions on which it transports milk for any other person, shall forfeit to the State twenty dollars for each offense. [General Laws (1902), section 3770.]

Every such company which refuses to transport over the line of its road any railroad ties, sleepers, or material to be used in the construction or repair of any other railroad, at the same rate or price as other freight of the same class, shall forfeit to the State not less than fifty nor more than three hundred dollars. [Ibid., section 3777.]

§ 1175. **Florida.**

From and after the passage of this Act, it shall be unlawful for any railroad, steamboat or transportation company engaged in the transportation of passengers or freight in this State to discriminate in favor of or against any person or persons, firm, or corporation, in any manner whatever as to charges of passenger, fare, or freight transportation. [Laws of 1893 (No. 90), ch. 4204, section 1.]

§ 1176. Georgia.

No railroad company shall discriminate in its rates or tariffs of freight in favor of any line or route connected with it as against any other line or route, nor when a part of its own line is sought to be run in connection with any other route, shall such company discriminate against such connecting line, or in favor of the balance of its own line, but shall have the same rates for all, and shall afford the usual and like customary facilities for interchange of freight to patrons of each and all lines alike. [Code (1895), section 2214.]

See Longan v. Central Ry. & B. Co., 74 Ga. 684 (1885).

§ 1177. Illinois.

Or if it shall charge, collect, or receive, at any point upon its railroad, a higher rate of toll or compensation for receiving, handling or delivering freight of the same class and quantity than it shall, at the same time, charge, collect, or receive at any other point upon the same railroad; or if it shall charge, collect or receive for the transportation of any passenger or freight of any description over its railroad, a greater amount as toll or compensation than shall at the same time, be charged, collected, or received by it for the transportation of any passenger, or like quantity of freight of the same class, being transported in the same direction, over any portion of the same railroad, of equal distance; or if it shall charge, collect, or receive from any person or persons, a higher or greater amount of toll or compensation than it shall, at the same time, charge, collect, or receive from any other person or persons for receiving, handling, or delivering freight of the same class and like quantity at the same point upon its railroad; or if it shall charge, collect, or receive from any person or persons, for the transportation of any freight upon its railroad, or higher or greater rate of toll or compensation than it shall, at the same time, charge, collect, or receive from any other person or persons, for the transportation of the like quantity of freight of the same class, being trans-

ported from the same point, in the same direction, over equal distances of the same railroad; or if it shall charge, collect, or receive from any person or persons, for the use and transportation of any railroad car or cars upon its railroad, for any distance, the same or a greater amount of toll or compensation than is at the same time charged, collected, or received from any other person or persons, for the use and transportation of any railroad car of the same class or number, for a like purpose, being transported in the same direction, over a greater distance of the same railroad; or if it shall charge, collect, or receive from any person or persons, for the use and transportation of any railroad car or cars upon its railroad, a higher or greater rate of toll or compensation than it shall, at the same time, charge, collect, or receive from any other person or persons, for the use and transportation of any railroad car or cars of the same class or number, for a like purpose, being transported from the same point in the same direction, over an equal distance of the same railroad; all such discriminating rates, charges, collections, or receipts, whether made directly, or by means of any rebate, drawback, or other shift or evasion shall be deemed and taken against such railroad corporation as *prima facie* evidence of the unjust discrimination prohibited by the provisions of this Act. [Annotated Statutes (1896), ch. 414, section 167.]

In Savitz v. Ohio & M. Ry., 150 Ill. 208, 37 N. E. 235, 27 L. R. A. 626 (1894), it was pointed out that where there are differences in the cost of serving there may not improperly be made corresponding differences in the rate.

§ 1178. **Indiana.**

It shall be an unjust discrimination for any such railroad company to make or give any undue or unreasonable preference or advantage to any particular person, firm, corporation, or locality; in connection with the transportation of any shipment or shipments, or to subject any particular kind of traffic

to any undue or unreasonable prejudice, delay, or disadvantage in any respect whatsoever.

Every railroad company which shall fail or refuse, under such regulations as may be prescribed by the Commission, to receive and transport without unreasonable delay or discrimination the passengers, tonnage, and cars, loaded or empty, of any connecting line of railroad company, and every railroad company which shall, under such regulations as may be prescribed by the Commission, fail or refuse to transport and deliver without unreasonable delay or discrimination, any passengers, tonnage, or cars, loaded or empty, destined to any point on or over the line of any connecting line of railroad, shall be deemed guilty of unjust discrimination: *Provided,* that perishable freights of all kinds and live stock shall have precedence of shipment. *Provided further,* that this shall not be construed as to require any railroad company to give the use of its terminal facilities to any other railroad company engaged in like business, except that if such terminal facilities are granted to one company, they shall be granted on like terms to all other companies. [Laws of 1905, ch. 53, section 14.]

See Louisville, E. & St. L. R. R. v. Wilson, 132 Ind. 517, 32 N. 311, 18 L. R. A. 105 note (1892), where it was held contrary to law to enter into a special arrangement with one shipper of ties, giving him a lower rate in return for his undertaking to supply the railroad with ties at a certain rate.

§ 1179. **Iowa.**

It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever; or subject any particular person, company, firm, corporation or locality or any particular description of traffic, to any prejudice or disadvantage in any respect whatsoever; but this shall not be construed to prevent any common carrier

from giving preference as to time of shipment of live stock, uncured meats, or other perishable property. [Code (1897), section 2124.]

No such common carrier shall charge, collect, demand or receive more for transporting a car of freight than it at the same time charges, collects, demands or receives per car for several cars of a like class of freight over the same railway, for the same distance, in the same direction; nor charge, collect, demand, or receive more for transporting a ton of freight than it charges, collects, demands, or receives per ton for several tons of freight under a carload of a like class over the same railway, for the same distance, in the same direction; nor charge, collect demand, or receive more for transporting a hundred pounds of freight than it charges, collects, demands, or receives per hundred for several hunderd pounds of freight, under a ton, of a like class, over the same railway, for the same distance, in the same direction; and all such discriminating rates, charges, collections, or receipts, whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be received as *prima facie* evidence of the unjust discrimination prohibited by this chapter; but for the protection and development of any new industry within the State, such railway company may grant concessions or special rates for any agreed number of carloads, which rates shall first be approved by the board of Commissioners, and a copy thereof filed in its office. [Ibid, section 2146.]

See Cook v. Chicago, R. I. & P. Ry., 81 Iowa 551, 46 N. W. 749, 25 Am. St. Rep. 512, 9 L. R. A. 764 (1890), where it was held that a railroad need not treat all its patrons upon equal terms, but might enter into special arrangements with some of them.

§ 1180. **Kansas.**

Sec. 16. It shall be unlawful for any railroad company or other common carrier to grant, or for any consignee or consignor to receive, any rebate or drawback, or enter into any arrange-

ment whereby such consignee or consignor shall, directly or indirectly receive a lower rate for transporting freight than the rate fixed by the orders of this board or the published schedules of such railroad company. It shall be unlawful for any railroad company or other common carrier to grant any special privileges to any person, firm, or corporation, either in the way of a preference in furnishing cars, side-track facilities, sites for elevators, mills, or warehouses, or any other form of preference, privilege, or discrimination. It shall be unlawful for any railroad company or common carrier, or any agent or employe thereof, or for any person, firm, or corporation to enter into any secret agreement with any firm, person or corporation for the purpose of giving any firm, person, or corporation any special privileges, favors, or discriminations in favor of such firm, person, or corporation. [Laws of Kansas, 1905, ch. 340, section 16.]

§ 1181. **Louisiana.**

If any railroad, express, telephone, telegraph, steamboat, or other water craft, or sleeping car company, subject hereto, directly or indirectly, or by any special rate, rebate, or other device, shall intentionally charge, demand, collect, or receive from any person, firm, or corporation, a greater or less compensation for any service rendered by it, than it charges, demands or receives from any other person, firm, or corporation, for doing a like and contemporaneous service, or shall violate any of the rates, charges, orders, or decisions of said Commission, such railroad, steamboat, or other water craft, express, telegraph, telephone, or other company, shall forfeit and pay to the State not less than one hundred dollars, nor more than five thousand dollars, to be recovered before any court of competent jurisdiction, at the suit of the said Commission, at the domicile of the Commission or the company, or at the place where the complaint arises, at the option of the Commission. *Provided,* That whenever any rate, order, charge, rule, or regulation of

the Commission is contested in court, as provided for in article 285, of this Constitution, no fine or penalty for disobedience thereto, or disregard thereof, shall be incurred until after said contestation shall have been finally decided by the courts, and then only for acts subsequently committed.

The power of the Commission shall affect only the transportation of passengers, freight, express matter, and telegraph and telephone messages, between points within this State, and the use of such instruments within this State. [Constitution (1898), article 286.]

§ 1182. **Maine.**

Every railroad doing business in the State, shall receive, forward and deliver to every other connecting railroad, without discrimination, all passengers, freight and merchandise with equal facilities and dispatch, and shall transport the same at rates of fare and freight as favorable as at the time are established, made, or allowed for the passengers, freight and merchandise transported over its road only, or received from or destined to any other railroad. [Revised Statutes (1903), ch. 52, section 12.]

§ 1183. **Massachusetts.**

Sec. 240. Every railroad corporation shall, subject to the provisions of section two hundred and forty-five, give to all persons reasonable and equal terms, facilities and accommodations for the transportation upon its railroad of themselves, their agents and servants, and of their merchandise and other property and for the use of its depot and other buildings and grounds; and, at any point where its railroad connects with another railroad, it shall give reasonable and equal terms and facilities of interchange. [Revised Laws (1902) ch. 111, section 240.]

§ 1184. **Minnesota.**

It shall be unlawful for any common carrier to make or give any unequal or unreasonable preference or advantage to any particular person, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation or locality to any unequal or unreasonable prejudice in any respect whatsoever. [Revised Laws (1905), section 2009.]

§ 1185. **Mississippi.**

Or if any railroad shall, for its advantage, or for the advantage of a connecting line, or for that of any person, locality, or corporation, make any discrimination in transportation against any person, locality, or corporation unless authorized by the Commission. . . . Such person or corporation, in either case shall be guilty of extortion, and may be punished therefor criminally, besides being liable civilly. [Annotated Code (1902), section 4287.]

See, for a discussion of discrimination in handling traffic, Alabama & V. Ry. v. Railroad Commission, 38 So. 356 (1905), and Gilliland v. Illinois Central Ry., 32 So. 916 (1903).

§ 1186. **Missouri.**

It shall be unlawful for any common carrier to charge, collect, mand or receive more for transporting a ton of freight than it at the same time charges, collects, demands or receives per car for several cars of a like class of freight over the same railroad, for the same distance, in the same direction, under substantially similar circumstances and conditions; or to charge, collect, demand or receive more for transporting a ton of freight than it charges, collects, demands or receives per ton for several tons of freight, under a carload, of a like class of freight over the same railroad, for the same distance, in the same direction, under substantially similar circumstances and conditions; or to charge, collect, demand or receive more for transporting a hun-

dred pounds of freight than it charges, collects, demands or receives per hundred for several hundred pounds of freight, under a ton, of a like class of freight, over the same railroad, for the same distance, in the same direction, under substantially similar circumstances and conditions. All such discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback or other shift or evasion, shall be deemed and taken against such railroad company as *prima facie* evidence of the unjust discrimination prohibited by this article; *Provided, however,* that for the protection and development of any new industry within this State, such railroad company may grant concessions in special rates for any agreed number of carloads, but such special rates as aforesaid shall first be approved by the board of railroad commissioners and a copy thereof filed in the office thereof. [Revised Statutes (1899), section 1130.]

It shall be unlawful for any such common carrier to charge, collect, demand or receive more for the transportation of any car of freight composed of several different classes of merchandise or freight, transported for the same owner to the same destination, than it at the same time charges for the transportation of a carload of freight of the highest class of merchandise or freight contained in said carload of mixed freight: *Provided, however,* that such common carrier shall not be liable for any damages or loss in transportation growing out of or that is the natural and direct result of shipping the said several classes of freight in one car. [Ibid, section 1131.]

It shall be unlawful for any such common carrier to charge, collect, demand or receive more for the transportation of less than a carload of freight when shipped to one owner, to one destination, than it at the same time charges for a carload of like freight, or when the car is loaded with freight of several classes, more than it charges for the transportation of a carload of the highest class of freight shipped in said car of mixed freight: *Provided,* that nothing in this sec-

tion shall be construed to forbid a railway company from transporting freights in carload lots at a less rate per hundred pounds than it charges, demands and receives per hundred pounds for like class of freight in quantities less than a carload. [Ibid, section 1132.]

In Rothschild v. Wabash, St. L. & P. R. R., 92 Mo. 91, 4 S. W. 418 (1887), differences in the circumstances were held to justify differences in rates.

§ 1187. **Nebraska.**

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give and preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such contracting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another engaged in like business. [Compiled Statutes (1899), section 4047.]

§ 1188. **New Hampshire.**

Every railroad corporation which shall contract with any person for the transportation of milk in large quantities over any portion of its railroad shall establish a tariff for the transportation of milk by the can over the same portion of its railroad with fairly proportionate advantages and facilities in every

respect; but the receipt of milk in large quantities by a railroad corporation from another railroad corporation at the point of intersection of their railroads, and the transportation of the same over a part of its railroad, shall not be deemed to require the corporation to establish a tariff under the foregoing provision. [General Laws (1903), ch. 160, section 21.]

See Concord & P. R. R. v. Forsaith, 59 N. H. 122, 47 Am. Rep. 181 (1879), holding the general principle of the common law to be that special reductions may be made to large shippers.

§ 1189. **Nevada.**

It shall be unlawful for any person or persons engaged alone or associated with others in the transportation of property by railroad, whose railroads are wholly or in part in the State of Nevada, from any boundary of said State to any point in said State, or from any point in said State to any other point in said State, directly or indirectly, to charge to or receive from any person or persons any greater or less rate or amount of freight, compensation, or reward than is charged to or received from any other person or persons for like and contemporaneous service in the carrying, receiving, delivering storing or handling of the same; and all persons engaged as aforesaid, shall furnish, without discrimination, the same facilities for the carriage, receiving, delivery, storage, and handling of all property of like character, carried by him or them and shall perform with equal expedition the same kind of services connected with the contemporaneous transportation thereof as aforesaid. [General Statutes (1885), section 894.]

§ 1190. **New Jersey.**

All companies whose railroads cross, intersect or join shall deliver to and receive from each other and forward to their destination all property intended for points on their respective roads with the same dispatch and at a rate of freight not exceeding the local tariff rate charged to other persons on similar

property received at and forwarded from the same point. [Laws of 1903, ch. 257, section 44.]

§ 1191. **Ohio.**

Every company whose line of road, or any part thereof, is within this State, shall so employ its rolling stock used for the transportation of freight as to afford as ample facilities for the transportation of local and way freight, delivered to or discharged by it along its line of road, as it affords for the transportation of through freight, in proportion to the amount of its rolling stock, and shall not give facilities for transportation to either class of freight in preference to the other. [Annotated Statutes (1906), section 3373.]

In State v. Cincinnati, N. O. & T. P. Ry., 47 Ohio St. 130, 23 N. E. 928, B. & W. 400 (1890), it was held that all shippers of oil must be treated without undue prejudice, both those who had tank cars and those who had not. See also Baltimore & O. R. R. v. Diamond Coal Co., 61 Ohio St. 242, 55 N. E. 616 (1899), where it was held that a railroad company whose line extends to a point of intersection with a canal of the State cannot make a valid contract to repay to a shipper a portion of the freight paid by him, it being the regular rate posted by the company and received from other shippers; such contract being prohibited by the sections of the Revised Statutes to prevent discrimination in rates of carriage.

§ 1192. **Oregon.**

It shall be unlawful for a person or persons engaged alone or associated with others in the transportation of property by railroad in the State of Oregon to charge to or receive from any person or persons any greater or less rate or amount of freight compensation or reward than is by him or them charged to or received from any other person or persons for like and contemporaneous service in carrying, receiving, storing, or handling the same. . . . And all persons engaged as aforesaid shall furnish, without discrimination, the same facilities for carriage, receiving, delivering, storage, and handling all property of like character carried by him or them, and shall perform

with equal expedition the same kind of services connected with contemporaneous transportation thereof as aforesaid. No break, stoppage, or interruption, nor any contract, agreement, or understanding, shall be made to prevent the carriage of any property from being treated as one continuous carriage, in the meaning of this act, from the place of shipment to the place of destination, unless such stoppage, interruption, contract, agreement, or understanding was made in good faith for some practical and necessary purposes, without any intent to avoid or interrupt such continuous carriage, or to evade any of the provisions of this act, unless prevented by unavoidable accident. [Annotated Laws (1892), section 4030.]

Goods intended by the shipper to be sent from points in the Willamette valley, above Portland, directly to San Francisco, or other points beyond the limits of the State, *via* Portland, may be carried from Corvallis to the latter place without reference to this act. *Ex Parte* Koehler, 25 Fed. 74 (1887).

Apparently shippers who belong to different classes may be given different rates in Pennsylvania, even although the freight shipped is of the same sort. See Hoover v. Pennsylvania R. R., 156 Pa. St. 220, 27 Atl. 282. 36 Am. St. Rep. 43, 22 L. R. A. 263 (1893); and Bald Eagle V. Ry. v. Nittany V. Ry., 171 Pa. St. 284, 33 Atl. 239 (1895).

§ 1193. Pennsylvania.

No railroad company, or other common carrier, engaged in the transportation of property, shall charge, demand or receive from any person, company or corporation, for the transportation of property, or for any other service, a greater sum than it shall charge or receive from any other person, company, or corporation for a like service, from the same place, upon like conditions, and under similar circumstances; and all concessions in rates and drawbacks shall be allowed to all persons, companies or corporations alike, for such transportation and service, upon like conditions, under similar circumstances and during the same period of time. Nor shall any such railroad company or common carrier make any undue or unreasonable discrimina-

tion between individuals, or between individuals and transportation companies, or the furnishing of facilities for transportation. Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of injury suffered. [Br. Pur. Digest (1894), p. 1815, section 187.]

§ 1194. **Rhode Island.**

No railroad corporation shall contract to furnish facilities for the transportation of milk, or shall carry it in large quantities over any portion of its line, without at the same time establishing a tariff under which it will receive, forward and deliver milk by the can over the same portion of its line and for any person tendering the same, so that the milk by the can shall be carried under fairly proportionate advantages in every respect, including price, time, and reasonable care for the same, as the milk carried in large quantities or under contract. [General Laws (1896), ch. 187, section 35.]

§ 1195. **South Carolina.**

It shall be unlawful for any such person or persons so engaged as aforesaid to charge, collect or receive for the transportation of any passenger or freight of any description upon its railroad for any distance within this State the same or a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation of any passenger of the same class or like quantity of freight of the same class over a greater distance of the same railroad; or to charge, collect or receive at any point upon its railroad a higher rate of toll or compensation for receiving, handling or delivering freight of the same class and quantity than it shall at the same time charge, collect or receive at any point upon the same railroad; or to charge, collect or receive for transportation of any passenger or freight of any description over its rail-

road a greater amount as toll or compensation than shall at the same time be charged, collected or received by it for the transportation of any passenger of the same class or like quantity of freight of the same class being transported over any portion of the same railroad of equal distance; or to charge, collect or receive from any person or persons a higher or greater amount of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons for receiving, handling or delivering freight of the same class and like quantity at the same time upon its railroad; or to charge, collect or receive from any person or persons for the transportation of any freight upon its railroad a higher or greater rate of toll or compensation than it shall at the same time charge, collect or receive from any person or persons for the transportation of a like quantity of freight of the same class being transported from the same point over equal distances of the same railroad; or to charge, collect or receive from any person or persons for the use and transportation of any railroad car or cars upon its railroad for any distance the same or a greater amount of toll or compensation than is at the same time charged, collected or received from any other person or persons for the use and transportation of any railroad car of the same class or number for a like purpose being transported over a greater distance of the same railroad; or to charge, collect or receive from any person or persons for the use and transportation of any railroad car or cars upon its railroad a higher or a greater rate of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons for the use and transportation of any railroad car or cars of the same class or number for a like purpose being transported from the same point over an equal distance of the same railroad. And all such discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback or other shift or evasion, shall be deemed and taken against such person or persons so engaged as aforesaid as *prima facie* evidence of the unjust discrimina-

tion prohibited by the provisions of this Article. [Civil Code (1902), section 2085.]

§ 1196. **South Dakota.**

Or to charge, collect, demand or receive more for transporting a ton of freight than it charges, collects, demands or receives per ton for several tons of freight under a carload of a like class of freight over the same railroad for the same distance, in the same direction, or to charge, collect, demand or receive more for transporting a hundred pounds of freight than it charges, collects, demands or receives per hundred for several hundred pounds of freight, under a ton, of a like class of freight over the same railroad, for the same distance, in the same direction; all such discriminating rates, charges, collections or receipts whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be deemed and taken against such railroad company as *prima facie* evidence of the unjust discrimination prohibited by this Act; provided, however, that for the protection and development of any new industry within this state, such railroad company may grant concessions or special rates for any agreed number of carloads, but such special rates aforesaid shall first be approved by the Board of Railroad Commissioners, and a copy thereof filed in the office thereof. [Laws of 1897, ch. 110, section 29.]

§ 1197. **Tennessee.**

It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, or to subject any particular person, company, firm or corporation or locality, or any particular description of traffic or any undue or unreasonable prejudice or disadvantage. [Laws of 1897, ch. 10, section 17.]

§ 1198. **Texas.**

It shall also be an unjust discrimination for any such railroad to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay, or disadvantage in any respect whatsoever.

Every railroad company which shall fail to refuse, under such regulations as may be prescribed by the Commission, to receive and transport without delay or discrimination, the passengers, tonnage and cars, loaded or empty, of any connecting line of railroad, and every railroad which shall, under such regulations as may be prescribed by the Commission, fail and refuse to transport and deliver without delay or discrimination, any passengers, tonnage or cars, loaded or empty, destined to any point on or over the line of any connecting line of railroad, shall be deemed guilty of unjust discrimination; provided, perishable freights of all kinds and live stock shall have precedence of shipment. [Revised Statutes (1895), art. 4574.]

In one case held that the terms "delay" and "discrimination" were to be used as convertible, and that delay was discrimination, within the terms of the statute; and hence, delay in a shipment having been admitted, it was proper to direct a verdict for plaintiff. Gulf, C. & S. F. Ry. Co. v. Lone Star Salt Co., 26 Tex. Civ. App. 531, 63 S. W. 1025 (1901). Also held in another case that a railroad company giving a preference to one shipper over another in the order of time of forwarding goods delivered for transportation shall be liable for all losses resulting from the delay, and also liable to a penalty for each act of discrimination, are valid: Hill & Morris v. St. Louis Southwestern Ry. Co. of Texas, (Tex. Civ. App.), 75 S. W. 874 (1904).

§ 1199. **Vermont.**

Sec. 3902. A person or corporation operating a railroad shall give to all persons reasonable and equal terms, benefits, facilities and accommodations for the transportation of themselves, their agents and servants, and of merchandise and other property upon such railroad; and for the use of the depots, buildings and

grounds thereof; and, at any point where such railroad connects with another railroad, reasonable and equal facilities of interchange. [General Statutes (1894), section 3902.]

§ 1200. **Virginia.**

3. It shall be unlawful for any transportation company to make or to give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or to any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. [Pollard's Code, section 1294c, as amended 1904.]

§ 1201. **Wisconsin.**

If any railroad, or any agent or officer thereof, shall directly or indirectly, by any special rate, rebate, drawback, or by means of false billing, false classification, false weighing, or by any other device whatsoever, charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it for the transportation of persons or property or for any service in connection therewith, than that prescribed in the published tariffs then in force, or established as provided herein, or than it charges, demands, collects, or receives from any other person, firm or corporation for a like and contemporaneous service, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful, and upon conviction thereof shall forfeit and pay into the State treasury not less than one hundred dollars nor more than ten thousand dollars for each offense; and any agent or officer so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a

fine of not less than fifty dollars nor more than one hundred dollars for each offense.

It shall be unlawful for any railroad to demand, charge, collect or receive from any person, firm or corporation a less compensation for the transportation of property or for any service rendered or to be rendered by said railroad, in consideration of said person, firm or corporation furnishing any part of the facilities incident thereto; provided nothing herein shall be construed as prohibiting any railroad from renting any facilities incident to transportation and paying a reasonable rental therefor. [Laws of 1905, ch. 362, section 22.]

§ 1202. Conclusion.

In general, it may be said that it is the expressed desire of the majority of people in most States that there shall be an aggressive campaign carried on against all forms of discriminations and preferences. It has been discovered that there are many and devious ways of creating undue preference and priority between shippers and industries, and the will of the people, it is plain, is that all this should be brought to an end by whatever method it is practised.

CHAPTER XXXIX.

STATE STATUTES AGAINST LOCAL DISCRIMINATION.

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§ 1211. Introduction.

It has been remarked often in the course of this treatise that there is not much common law against local discrimination as such. So far as the common law is concerned, it is enough if the various rates charged for transportation to various localities are reasonable in themselves. Perhaps it may be said to be implied in this that the different rates in the schedule shall not be outrageously disproportionate in their relations to one another, but this goes to the extreme limit of the common law. Within the last twenty-five years, however, there has been growing up a system of statutory prohibition of local discrimination, until local discrimination is forbidden in more than twenty-eight of the States. These provisions in each State are of two general types, more or less elaborately worked out in the different States. Most States forbid both (1) giving undue preference to certain localities, and also (2) charging

more for a short haul than for a long haul. The extracts given in this chapter will show into how much detail this goes in some jurisdictions and how general the prohibitions are in others.

§ 1212. **Arkansas.**

Persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station. [Digest of Statutes (1894), section 6301.]

§ 1213. **California.**

Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing or port at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to a more distant station, port or landing. [Constitution (1880), article xii, section 21.]

§ 1214. **Connecticut.**

No railroad company shall charge or receive, for the transportation of freight to any station on its road, a greater sum than is at the time charged or received for the transportation of the like kind and quantity of freight, from the same original point of departure and under similar circumstances, to a station at a greater distance on its road in the same direction. Two or more railroad companies, whose roads connect, shall not charge or receive, for the transportation of freight to any station on the road of either of them, a greater sum than is at the time charged or received for the transportation of the like kind and quantity of freight, from the same original point of departure and under similar circumstances, to a station at a greater distance on the road of either of them in the same

direction. In the construction of this section the sum charged or received for the transportation of freight shall include all terminal charges; and the road of a company shall include all the road in use by it, whether owned or operated under a contract or lease. [General Statutes (1902), section 3772.]

§ 1215. **Illinois.**

If any such railroad corporation shall charge, collect or receive for the transportation of any passengers, or freight of any description, upon its railroad, for any distance, within this State, the same, or a greater amount of toll or compensation than is at the same time charged, collected, or received for the transportation, in the same direction, of any passenger, or like quantity of freight of the same class, over a greater distance of the same railroad. . . . All such discriminating rates, charges, collections, or receipts, whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be deemed and taken as *prima facie* evidence of the unjust discriminations prohibited by the provisions of this Act, and it shall not be deemed a sufficient excuse or justification of such discrimination on the part of such railroad corporation, that the railway station or point, at which it shall charge, collect, or receive the same or less rates of toll or compensation, for the transportation of such passenger or freight, or for the use and transportation of such railroad car the greater distance than for the longer distance, is a railroad station or point at which there exists competition with any other railroad or means of transportation. [Annotated Statutes (1896), ch. 114, section 168.]

The leading case under this provision is Illinois Cent. Ry. v. People, 121 Ill. 304, 12 N. E. 670 (1887). It was held in that case that charging ten cents per hundred pounds for carrying coffee in sacks from C. to M., 172 miles, while charging another shipper sixteen cents per hundred from C. to K., 56 miles, was illegal discrimination. This involved applying strictly the provision that competitive conditions between railways at M. could not be urged in excuse, and it was immaterial that M. and K. were

not competing localities in the grocery trade. See also Chicago & A. R. R. v. People, 67 Ill. 11, 16 Am. Rep. 599 (1873). But in Savitz v. Ohio & M. R. R., 150 Ill. 208, 37 N. E. 235, 27 L. R. A. 626 (1894) this was held to make out only a *prima facie* case, the less cost of handling the particular long distance shipment in question was allowed to be shown. For it is not a discrimination merely that is prohibited by the statute but an "unjust" discrimination. A railroad may properly charge a less rate per mile for longer distances than it charges for shorter. St. Louis, Alton, etc., R. R. Co. v. Hill, 14 Ill. 579 (1884).

§ 1216. **Indiana.**

It shall be unjust discrimination for any railroad company subject hereto to charge or receive any greater compensation in the aggregate for the transportation of like kind of property or passengers for a shorter than for a longer distance over the same line in the same direction, the shorter distance being included in the longer: *Provided,* That upon application to the Commission any railroad company may in special cases, to prevent manifest injury, be authorized by the Commission to charges less for longer than for shorter distance for transporting persons and property, and the Commission shall, from time to time, prescribe the extent to which such designated railroad may be relieved from the operation of this subdivision: *Provided,* That no manifest injustice shall be imposed upon any person at intermediate points. *Provided, further,* That nothing shall be so construed as to prevent the Commission from approving what are known as "group rates" on any of the railroads in the State. [Laws of 1905, ch. 53, section 14.]

§ 1217. **Iowa.**

It shall be unlawful for any common carrier subject to the provisions of this chapter to charge or receive any greater compensation in the aggregate for the transportation of passengers or a like kind of property for a shorter than a longer distance over its railroad, all or any portion of the shorter haul being included within the longer, and shall charge no more for transporting freight to or from any point on its railroad than a fair

and just rate, compared with the price it charges for the same kind of freight transportation to or from any other point. [Code (1897), sec. 2126.]

In Blair v. Sioux City & P. Ry., 109 Iowa, 369, 80 N. W. 673 (1899), it was held that a petition alleging that two railroad companies voluntarily established joint rates, and charged plaintiff a rate in excess of the same joint rates on like shipments, at the same time, which were made to other points, for like distances, over their lines of road, makes a *prima facie* case showing discrimination.

§ 1218. **Kansas.**

Nor shall it charge more for transporting freight from any point on its line than a fair and just proportion of the price it charges for the same kind of freight transported from any other point; nor shall it be lawful to charge a greater freight rate to haul any class of goods for a shorter distance than for a longer one in the same general direction under like conditions, and over the same system of road in Kansas, except by the consent of the commissioners. [General Laws (1901), section 5985, Laws of 1901, chap. 286, section 25.]

§ 1219. **Kentucky.**

It shall be unlawful for any person or corporation owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person, or corporation owning or operating a railroad in this State to receive as great compensation for a shorter as for a longer distance; *provided,* That upon application to the railroad commission, such common carrier, or person, or corporation owning or operating a railroad in this State may, in special cases, after investigation by the commission,

be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this State may be relieved from the operations of this section. [Constitution, sec. 218.]

If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included within the longer distance, such person shall for each offense be guilty of a misdemeanor, and fined not less than $100 nor more than $500, to be recovered by indictment in the Franklin Circuit Court or the Circuit Court of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order, the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission;

and after such order, it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the Circuit Court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the commission shall use propert efforts to see that such company or carrier is indicted and prosecuted. [General Laws (1894), sec. 820.]

In Illinois C. Ry. v. Com., 23 Ky. Law Rep. 544, 63 S. W. 448 (1901), it was held that (1) Const., § 218, and Ky. St., § 820, prohibiting a common carrier charging more for a short haul than for a long haul, where the shorter distance is included in the longer distance, are not in conflict with the Constitution of the United States or any act of Congress; that (2) the Railroad Commissioners may consider the application of a railroad company, and determine that for the present and future it shall be relieved of the operation of those provisions of the Constitution and statutes in the transportation of a particular commodity between certain points; that (3) the action of the Railroad Commissioners, in exonerating a common carrier from the operation of those sections of the Constitution and statutes, is not retrospective, and does not relieve the carrier of punishment for past offenses; and that (4) a railroad company may be indicted for charging more for a short haul than for a long haul, in violation of Constitution, § 218, and Ky. St., § 820, without recommendation by the Railroad Commission.

But it was held in Louisville & N. Ry. v. Walker, 23 Ky. Law Rep. 453, 63 S. W. 20 (1901), that Const., § 218, did not apply unless the shorter was included within the longer distance, and that a carrier did not violate the law where the long haul is altogether on its main line, while the short haul originates on a branch road, as the shipment is an entirety, and cannot be split into parts to bring it within the law.

Again, a joint traffic arrangement, by which connecting carriers haul from a point on one road to a point on the other road for less than the first carrier charges from the same point on its road to its terminus, between the points, is not in violation of St., § 820, making it an offense for a carrier to charge more for hauling for a shorter than for a longer distance "over the same line" in the same direction, the shorter being included in the longer distance, as is held in Com. v. Chesapeake & O. Ry., 115 Ky. 57, 72 S. W. 361 (1903). Nor does Const., § 215, providing that all railway companies shall transport freight of the same class for all persons from and to the same points and upon the same conditions, in the same manner, and for the same charges, prohibit a railway company from charging a through rate which is less than the sum of

the local rates between the two points, as the recent case of Southern Ry. in Ky. v. Com., 25 Ky. Law Rep. 1078, 77 S. W. 207 (1903), decides.

On the other hand it is established by Louisville & N. Ry. v. Com., 21 Ky. Law Rep. 232, 51 S. W. 164, 1012 (1899), and by Louisville & N. Ry. v. Com., 20 Ky. Law Rep. 1380, 46 S. W. 707, 47 S. W. 210, 598 (1898), that competition does not justify a carrier in charging more for a shorter than for a longer distance, as the words "substantially similar circumstances and conditions" relate to the actual cost of transportation. By a parity of reasoning, however, it is held in Louisville & N. Ry. v. Com., 20 Ky. Law Rep. 1099, 48 S. W. 416 (1898), and in Louisville & N. Ry. v. Com. (Ky. App.), 46 S. W. 702 (1898), that if there is dissimiliarity of conditions of shipment, so that the longer shipment is really the cheaper to handle, none of these clauses apply.

As to respective powers under these sections it was held in Louisville & N. Ry. v. Com., 20 Ky. Law Rep. 1380, 47 S. W. 598 (1898), that under Const., § 218, prohibiting common carriers from charging more for a short than for a long haul, but providing that the Railroad Commission may in "special cases" grant relief from the operation of the section, the action of the Commission in refusing such relief cannot be reviewed by the courts.

And in Illinois C. Ry. v. Com., 23 Ky. Law Rep. 1159, 64 S. W. 975, it was held that, as no indictment could be returned by the grand jury for a violation of the statute until the Railroad Commission had refused to exonerate the carrier, such statute is not violative of Const., § 218, prohibiting any common carrier from charging more for transporting passengers or property for a shorter than for a longer distance, and providing that the Railroad Commission may prescribe the extent to which a carrier may be relieved from the operation of the section since the question as to what penalty shall be imposed, or when, is left to the discretion of the Legislature.

See also as to remedies under these sections Louisville & N. Ry. v. Com., 106 Ky. 633, 46 S. W. 702 (1898); Hutcheson v. Louisville & N. R. R. (Ky.), 63 S. W. 33 (1901); Louisville & N. R. R. v. Com. (Ky.), 71 S. W. 910 (1903); and McChord v. Cincinnati, N. O. & T. P. R. R., 183 U. S. 483, 46 L. Ed. 289, 22 Sup. Ct. 165 (1901).

§ 1220. Louisiana.

The power and authority is hereby vested in the Commission, and it is hereby made its duty . . . to prevent such companies from charging any greater compensation in the aggregate for the like kind of property or passengers, or messages, for a shorter than a longer distance, over the same line, unless authorized by the Commission to do so in special cases. [Constitution (1898), Art. 284.]

§ 1221. **Massachusetts.**

No railroad corporation shall charge or receive for the transportation of freight to any station on its road a greater amount than is at the time charged or received for the transportation of the like class and quantity of freight from the same original point of departure to a station at a greater distance on its road in the same direction. Two or more railroad corporations whose roads connect shall not charge or receive for the transportation of freight to any station on the road of either of them a greater amount than is at the time charged or received for the transportation of the like class and quantity of freight from the same original point of departure to a station at a greater distance on the road of either of them in the same direction. In the construction of this section, the amount charged or received for the transportation of freight shall include all terminal charges; and the road of a corporation shall include all the road in use by it, whether owned or operated under a contract or lease. [Revised Laws (1902), ch. 111, sec. 243.]

In Com. v. Worcester & N. R. R., 124 Mass. 561 (1878), it was held that this section applied only to the transportation of freight by such a corporation as a common carrier over its own road, and not over other railroads, for which it charged and received nothing except as collecting agent of the corporations owning such other railroads.

§ 1222. **Michigan.**

That it shall be unlawful for any railroad company doing business in this State, operating the shortest competing line of railroad, to charge a greater amount of toll or compensation for the transportation of freight from any non-competing point on its line of railroad than it shall charge at the nearest railroad competing point on its line of road in opposite direction, to that from which such freight is to be moved, when of the same class, in like quantity, and for the same destination in this State. It is also hereby further provided that whenever freight is taken from any point on the

longer competing line or lines, that where the distance from such shipping point to the place of destination does not exceed the entire length of the shortest competing line, then the same rule shall apply as is provided in this section for the shortest competing line as to rates of freight. [Compiled Laws (1897), sec. 5247.]

§ 1223. **Minnesota.**

No carrier shall charge or receive greater compensation for the transportation of passengers or of like kind or class and quantity of property, for a shorter than for a longer distance over the same line, the shorter being included within the longer distance; but this shall not be so construed as authorizing any carrier to charge or receive as great compensation for a shorter as for a longer distance; but upon application to the Commission such carrier, in special cases, after investigation by the commission, may be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of this section. No carrier shall charge or receive any greater compensation per ton per mile for contemporaneous transportation of the same class of freight for a longer than for a shorter distance over the same line in the same general direction, or from the same original point of departure, or to the same point of arrival; but this shall not be construed so as to authorize any carrier to charge as high a rate per ton, per mile, for a longer as for a shorter distance. [Revised Laws (1905), section 2017.]

In State ex rel. v. Minneapolis & St. L. R. R., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514 (1900), it was shown that the tariff rate on coal from D. to N. was $2.50 and from D. to twenty-one stations along the same lines, the most southerly being B., 112 miles beyond N., the rate was the same. The court inclined to support this schedule upon the commercial necessities of the situation, citing Steenerson v. Gt. Northern Ry., 69 Minn. 353, 72 N. W. 713 (1897).

§ 1224. **Mississippi.**

Or if any railroad shall, for its advantage, or for the advantage of a connecting line, or for that of any person, locality or corporation, make any discrimination in transportation against any person, locality or corporation, unless authorized by the Commission, or if any railroad company shall charge more for a short haul than for a long one, under substantially similar circumstances and conditions, without the sanction of the Commission, such person or corporation, in either case, shall be guilty of extortion, and may be punished therefor criminally, besides being liable civilly. [Annotated Code (1892), section 4287.]

See Alabama & V. Ry. v. Railroad Commissioners, 38 So. 356 (1905).

§ 1225. **Missouri.**

Discrimination between persons or localities prohibited.—It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person, company or firm, corporation or locality, in the transportation of goods, wares and merchandise of any character, or to subject any particular person, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage with respect to such transportation; and all such common carriers shall afford equal facilities for the interchange of traffic between their respective lines and for receiving, forwarding and switching cars and delivering property to and from their lines, and to and from other lines and places connected therewith, and shall not discriminate in their accommodation, rates or charges between such connecting lines and places. But this provision shall not be construed as requiring such common carriers to give the use of their tracks or terminal facilities to other common carriers engaged in a similar business. [Revised Statutes (1899), section 1133.]

Discrimination—long and short haul.—It shall be unlawful for any such common carrier to charge or receive any greater compensation in the aggregate for the transportation of like kinds of property under similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction: Provided, however, that nothing contained in this section shall apply to the carriage, storage or handling of property, either free or at reduced rates, for the United States, for the State of Missouri, or for any fair, exposition, religious, scientific, benevolent or charitable purpose. [Ibid, section 1134.]

The ruling case in the construction of these sections seems to be Cohn v. St. Louis, I. M. & S. Ry., 181 Mo. 30, 79 S. W. 961 (1904). There it was held that in an action against a railroad company for the violation of Rev. St. 1899, § 1133, prohibiting railroads from giving any unreasonable advantage to any locality, or subjecting any locality to unreasonable disadvantage, and section 1134, prohibiting them from charging higher rates for a shorter than for a longer haul, a petition alleging that the defendant has charged the plaintiffs a higher rate for shipping freight from a certain point to their station than its published tariffs from the same point in the same direction to stations at a greater distance—specifying the difference in the charges, and the amount on which the excessive freight was paid, and alleging that merchants doing business at the other points were given an undue advantage over plaintiffs—sufficiently states in what way they were injured by defendant's acts.

And where a railroad company charges higher rates for carrying freight a less distance than its published rates for carrying it a greater distacce in the same direction over the same road, it violates these sections, though it does not actually carry any freight the greater distance. See to this affect Seawell v. Kansas City, F. S. & M. Ry., 119 Mo. 222, 24 S. W. 1002 (1893). Compare McGrew v. Missouri P. Ry., 177 Mo. 533, 76 S. W. 995 (1903).

§ 1226. **Nebraska.**

That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions for a shorter than for a longer distance over

the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the board appointed under the provisions of this act, such common carrier may, in special cases after investigation by the board, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the board may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this Act. [Compiled Statutes (1899), section 4048, ch. 72, art. viii, section 4.]

§ 1227. **Nevada.**

It shall be unlawful for any person or persons engaged in the transportation of property, as provided in section one of this Act, to charge or receive any greater compensation per carload, or part thereof, of similar property, for carrying, receiving, storing, forwarding, or handling the same for a shorter than for a longer distance in one continuous carriage. [General Statutes (1885), section 897.]

§ 1228. **New Hampshire.**

No railroad corporation shall charge or receive for the transportation of freight to any station on its road in this State a greater sum, including terminal charges, than is at the same time charged or received for the transportation of the like class and quantity of freight from the same original point of departure to a station in this State at a greater distance in the same direction on its road. This provision shall apply to corporations operating two or more connecting railroads in this State as if the railroads belonged to or were operated by a single corporation. [Public Statutes, ch. 160, section 19.]

The principal case upon this section is Osgood v. Concord R., 63 N. H. 255 (1884), where it was held that a railroad which charges and receives for the transportation of a carload of merchandise to a station on its road where the merchandise is delivered and is accepted by the consignees, more than it charges for such transportation of similar goods for a greater distance, it liable to the penalty imposed by statute for such disproportionate charge, although by the original contract for transportation the merchandise was to have been transported to a more distant station.

§ 1229. **New Jersey.**

No company shall charge or receive any greater rate of compensation for transportation of property between way stations or between a terminal station and a way station than for transportation of such property between terminal stations. [Laws of 1903, ch. 257, section 44.]

§ 1230. **North Carolina.**

That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the commission appointed under the provisions of this Act such common carrier may, in special cases, after investigation by the commissioner be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this Act: *Provided,* that nothing in this Act contained shall be taken as in any manner abridging or controlling the rates of freights charged by any

railroad in this State for conveying freight which comes from or goes beyond the boundaries of the State and on which freight less than local rates on any railroad carrying the same are charged by such railroads. But said railroad company shall possess the same power and right to charge such rates for carrying such freight as they possessed before the passage of this Act. [Laws of 1899, ch. 164, section 14.]

See No. Carolina Corp. Com. v. Atlantic C. L. Ry., 137 N. C. I. 49 S. E. 191 (1904).

§ 1231. **North Dakota.**

It shall be unlawful for any railroad, railroad corporation or common carrier, subject to the provisions of this Act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of a like kind of property for a shorter than for a longer distance over its railroad, all or any portion of the shorter haul being included within the longer. And said railroad, railroad corporation, or common carrier shall charge no more for transporting passengers or freight to or from any point on its railroad than a fair and just rate as compared with the price it charges for the same kind of transportation to and from any other point. [Laws of 1897, ch. 115, section 17.]

§ 1232. **Ohio.**

No company or person owning, controlling, or operating a railroad, in whole or in part, within this State, shall charge or receive for transportation of freight for any distance within this State a larger sum than is charged by the same company or person for the transportation in the same direction, of freight of the same class or kind, for an equal or greater distance over the same railroad and connecting lines of railroad; and every such company or person who violates, or permits to be violated, the provisions of this section, shall forfeit and pay to the party aggrieved a sum equal to double the amount of the overcharge,

but in no case less than twenty-five dollars, and shall also for every such unlawful act, forfeit and pay to the State a penalty of not less than one hundred nor more than one thousand dollars, to be recovered in a civil action, brought in the name of the State, by the prosecuting attorney of the county wherein such offense was committed, as a part of his official duties, whenever compliant is made to him, and he is satisfied that the provisions of this section have been violated. [Annotated Revised Statutes (1906), section 3373.]

§ 1263. **Pennsylvania.**

All individuals, associations and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made, in charges for, or in facilities for transportation of freight or passengers, within the State, or coming from or going to any other State. Persons and property transported over any railroad shall be delivered at any station, at charges not exceeding charges for transportation of persons and property of the same class in the same direction to any more distant station; but excursion and commutation tickets may be issued at special rates. [Constitution (1874), art. 17, section 3.]

This provision was held efficient in itself without ancilliary legislation in Central Iron Works v. Pennsylvania R. R., 2 Dauph. Co. 308, 17 Pa. Co. Ct. 651, 5 Pa. Dist. 247 (1895). In that case plaintiff averred in its bill that defendant allowed favored individuals, associations and corporations upon their semi-bituminous coal, carried and transported to P. and G. piers, from their mines situated in the several coal regions, a secret rate not exceeding $1.10 per gross ton, and from the W. region a rate not exceeding $1.35 per gross ton, while for the same class and quality of coal, transported from the same regions, in the same direction, to a less distant point, the plaintiff had been, and was still, compelled to pay a rate of $1.47 and $1.76, respectively, per gross ton, contrary to the provisions of section 3, article 17, of the Constitution, and asked for an injunction to restrain the defendants from making such charges. Defendants demurred, but decision was given for plaintiffs.

§ 1234. **South Carolina.**

It shall be unlawful for any person or persons in the transportation of property as provided in section 2083 of this chapter, to charge or receive any greater compensation for carrying, receiving, storing, forwarding or handling articles of the same character and description for a shorter than a longer distance in one continuous carriage; and the road of a corporation shall include all the road in use by such corporation, whether owned or operated under a contract or lease by such corporation: *Provided,* That nothing in this chapter contained shall be construed so as to require any corporation or combination of corporations to regulate their charges for shorter distances by their proportion of through rates between terminal or junctional competitive points: *Provided, further,* That if one corporation should use, operate or otherwise control, wholly or in part, several lines or divisions of hitherto independent railroads within the State the Commission may, in their discretion, conjointly with the said corporations, fix rates of toll or compensation for freight traffic on each of said hitherto independent lines or divisions; *Provided, further,* That the railroad commission conjointly with the railroad companies, shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and internal improvements in this State. [Civil Code (1902), section 2086.]

In Sternberger v. Cape F. & Y. V. R. R., 29 S. C. 510, 7 S. E. 846 (1888), it was held in refusing relief claimed under this section that where freight was shipped from one point in South Carolina to another point in that State was necessarily carried in part over railroads lying in another State, such commerce was interstate business, and therefore that the freight charges in such case were beyond the jurisdiction of the State Railroad Commission. The general doctrine had already been established in Railroad Commissioners v. Railroad Company, 22 S. C. 220 (1884), and Hall v. So. Carolina R. R., 25 S. C. 564 (1886).

§ 1235. **South Dakota.**

If any such railroad corporation . . . shall charge, collect or receive from any person or persons for the transporta-

tion of any freight upon its railroad, a higher or greater rate of toll or compensation than it shall, at the time, charge, collect or receive from any other person or persons for the transportation of the like quantity of freight of the same class, being transported from the same point in the same direction over equal distances of the same railroad, or if it shall charge, collect or receive from any person or persons for the use and transportation of any railroad car or cars upon its railroad, for any distance, a greater amount of toll or compensation than is at the same time charged, collected or received from any other person or persons, for the use and transportation of any railroad car of the same class or number, for a like purpose, being transported in the same direction, over a greater distance of the same railroad; . . . all such discriminating rates, charges, collections or receipts whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be deemed and taken against such railroad corporation, as *prima facie* evidence of the unjust discriminations prohibited by the provisions of this Act; and it shall not be deemed a sufficient excuse or justification of such discrimination on the part of the said railroad corporation that the railroad station or point at which it shall charge, collect or receive less compensation in the aggregate for the transportation of such passenger or freight or for the use and transportation of such railroad car the greater distance, than for the shorter distance, is a railroad station or point at which there exists competition with any other railroad or means of transportation. [Laws of 1897, chap. 110, section 28.]

§ 1236. **Tennessee.**

If any person owning or operating a railroad in this State, or any common carrier shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially like circum-

stances and conditions, for a shorter than a longer distance over the same line in the same direction, the shorter being included within the longer distance, such person or common carrier shall, for each offense, be guilty of a misdemeanor and fined, not less than $100 nor more than $500. [Laws of 1897, chap. 10, section 18.]

See Ragan v. Aiken, 77 Tenn. (9 Lea) 609, 42 Am. Rep. 684 (1882).

§ 1237. **Texas.**

It shall also be an unjust discrimination for any railroad subject hereto to charge or receive any greater compensation in the aggregate for the transportation of like kind of property or passengers for a shorter than for a longer distance over the same line; provided, that upon application to the Commission any railroad may in special cases, to prevent manifest injury, be authorized by the Commission to charge less for longer than for shorter distances for transporting persons and property, and the Commission shall from time to time prescribe the extent to which such designated railroad may be relieved from the operations of this provision; provided that no manifest injustice shall be imposed upon any citizen at intermediate points. Provided, further, that nothing herein shall be so construed as to prevent the Commission from making what are known as "group rates" on any line or lines of railroad in this State. [Revised Statutes (1895), art. 4574 (3).]

§ 1238. **Vermont.**

A railroad corporation whose railroad is located in the State, shall not charge a larger sum for freight, merchandise, or passengers thereon for a less distance, to or from a way station on said road, than is charged for a greater distance; and in case of a violation of this provision, the excess so charged may be recovered from said corporation, by the party aggrieved, in an action for money had and received, with costs. [Vermont Statutes (1894), section 3901.]

Two or more corporations whose roads connect shall not charge or receive for the transportation of freight to any station on the road of either of them a greater sum than is at the time charged or received for the transportation of the like class and quantity of freight from the same original point of departure to a station at a greater distance on the road of either in the same direction. [Ibid, section 3903.]

§ 1239. **Virginia.**

It shall be unlawful for any transportation company doing business in this State to take, charge, or receive any greater compensation in the aggregate for the transportation of passengers of the same class or property along the same line in the same direction for a shorter than for a longer distance, the shorter being included within the longer distance. But this section, shall not be construed as authorizing any such company to charge and receive as great compensation for a shorter as for a longer distance: provided, however, that upon application to the State Corporation Commission any such company may, in special cases, after investigation by the said Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property, and the said Commission may, from time to time, subject to the provisions of the Constitution, prescribe the extent to which such designated company may be relieved from the operation of this section. [Pollard's Code, section 1294c, as amended (1904).]

§ 1240. **West Virginia.**

All railroad corporations whose lines of road shall extend into or through this State and which extensions are incorporated by the laws of this State or any other State, or the United States, shall take and transport passengers and freight when offered: provided, that such railroad corporation shall not be permitted to charge for the transportation of freight and pas-

sengers, or either, a less sum from one terminus of their road to the other, than from an intermediate station to either terminus thereof, nor a greater sum for the transportation of freight and passengers, or either, from any intermediate station to either terminus of the road, or from either terminus to an intermediate station, or from one intermediate station to another, than from any intermediate station to either terminus or from either terminus to any intermediate station, or from one intermediate station to another, where the distance is less. [Code (1899), chap. 54, p. 602, Laws of 1872-3, chap. 227.]

§ 1241. **Wisconsin.**

Whenever passengers or property are transported over two or more connecting lines of railroad between points in this State, and the railroad companies have made joint rates for the transportation of the same, such rates and all charges in connection therewith shall be just and reasonable, and every unjust and unreasonable charge is prohibited and declared to be unlawful; provided, that a less charge by each of said railroads for its proportion of such join rates than is made locally between the same points on their respective lines shall not for that reason be construed as a violation of the provisions of this Act, nor render such railroads liable to any of the penalties hereof. [Laws of 1905, chap. 362, section 5.]

§ 1242. **Conclusion.**

It must be obvious from an examination of these extracts from the statutes of twenty-nine States that public opinion has gone further than the common law in dealing with discrimination. The general clauses against showing undue or unreasonable preference or priority to any locality, or localities are significant, although the phraseology is so cautious in most of them that any justifiable differences may be made, and one State specifically saves group rates, it will be remembered. The specific provisions against charging more for a short haul than

for the long haul within which it is included constitute the most characteristic feature in these statutes respecting local discrimination, and the fact that there is a deep-rooted prejudice against this practice in rate making must be faced. In some States it will have been noticed the legislatures have provided that competition at the more distant point shall not justify making a lower rate for a longer haul. Altogether, some law against local discrimination is certain to be a permanent limitation upon the making of railroad rates.

CHAPTER XL.

RATE REGULATION BY STATE RALROAD COMMISSIONS.

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§ 1251. Introduction.

In this chapter are collected some extracts from the statutes of various States, showing the powers of the State commissions in dealing with railroad rates. Most States have a railroad commission, or commissioner. In some States these officers have little or no power to pass upon the rates established by the railroads; but in the majority of States which have railroad commissioners, these officers have power of one sort or another to review the rates fixed by the carrier. The extent of the powers granted to these commissions differs widely. In some States they have no more power than to determine upon complaint made to them whether the rates charged by the railroad are unreasonable; in other States they have the power to fix the rates which the railroad shall be allowed to charge in substitution for the rate of which complaint is now made. Most exacting of all are certain States which give to their commissions power to establish complete schedules of rates for all transportation by rail within the State or which enact by

primary legislation such complete schedules of rates, giving the commission power to revise them. Statutes of this last sort are too elaborate for inclusion here; all that is attempted is to give some general idea of the power of the State commissions in passing upon railroad rates.

§ 1252. **Alabama.**

It is the duty of the railroad commissioners to consider and carefully revise all tariffs of charges for transportation made by any person or corporation owning or operating a railroad in this State; and if, in their judgment, any such charge is more than just compensation for the service for which it is proposed to be made, or amounts to unjust discrimination against any person, locality or corporation, they shall notify the party making the same of the changes necessary to reduce the rate to just compensation, or to avoid unjust discrimination, and when such charges are made, or when none are deemed proper and expedient, they shall append to the tariff of charges a certificate of their approval; and they shall exercise a watchful and careful supervision over all tariffs and their operation, and revise the same, from time to time, as justice to the public and the railroads may require, and increase or reduce any of the rates, as experience and business operations may show to be just, but in revising the tariff, the commissioners shall take into consideration the nature of the service to be performed, the entire business of the railroad, and its earnings from passengers and other traffic, and so revise the same as to allow a fair and just return on the value of the railroads, its appurtenances and equipments. [Laws of 1903, No. 94, section 10.]

§ 1253. **California.**

Said commissioners shall have the power and it shall be their duty to establish rates or charges for the transportation of passengers and freight by railroads or other transportation companies, and publish the same from time to time with such

changes as they may make. [Constitution (1880), art. 13 section 22.]

In Southern Pac. Ry. v. Railroad Comm'rs, 78 Fed. 236 (1896), it was held that the railroad commission could not so reduce rates as to leave to the railroad less than enough to pay all proper annual chares, including a fair return upon its investment.

§ 1254. **Florida.**

That said commissioners shall make and furnish to each railroad corporation doing business in this State, as soon as practicable, a printed or written schedule of just and reasonable rates and charges for transportation of freights, passengers, and cars, on its railroad or railroads under its control or management, and such schedule, certified by the chairman of the commissioners, shall be admitted in evidence without necessity for other proof, and shall in all suits brought against any railroad corporation wherein is involved the rates of any such railroad corporation for the transportation of freight of any description, or charges for the transportation or use of any kind of car upon the tracks of any railroad or any of the branches thereof, or for the transportation of any passenger or passengers, or for any unjust discrimination in relation thereto, be deemed and taken in all the courts of this State as *prima facie* evidence that the rates fixed in such schedule are just and reasonable rates of charges for the transportation of freight, cars and passengers upon the railroads, and said commissioners shall, as often as circumstances may require, change or revise any schedule or schedules, and furnish all railroad companies doing business in this State with notice of such changes or revisions and such notice shall state the time when such changes or revisions shall go into effect. [Laws of 1899 (No. 39), chap. 4700.]

In State ex rel. v. Seaboard Air Line, 38 So. 658 (1904), it was held that the burden was upon the railroad company to prove that the specific rate prescribed by the Railroad Commission, together with the other rates prescribed by it, deprives the company of the rates guaranteed to it by

the Federal Constitution. See, also, Pensacola & A. R. R. v. Florida, 27 Fla. 403, 5 So. 833 (1889).

§ 1255. **Georgia.**

That the said railroad commissioners are hereby authorized and required to make for each of the railroad corporations doing business in this State, as soon as practicable, a schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said railroads; and said schedule shall, in suits brought against any such railroad corporations wherein is involved the charges of any such railroad corporation for the transportation of any passenger or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads; and said commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedules. [Acts of 1878-79, No. 269, section 6.]

See State v. Wrightsville & T. R. R., 104 Ga. 437, 30 S. E. 891 (1900), as to the limitations upon this power, holding that the Commission cannot require the making of joint through arrangements. But see Augusta B. Co. v. Central of Ga. Ry., 121 Ga. 48, 48 S. E. 714 (1904), holding that the Commission has power to issue rules against preferential rates.

§ 1256. **Illinois.**

The railroad and warehouse commissioners are hereby directed to make for each of the railroad corporations doing business in this State, as soon as practicable, a schedule of reasonable maximum rates and charges for the transportation of passengers and freights and cars of each of said railroads; and said schedule shall in all suits brought against such railroad corporations wherein is in any way involved the charges of any such railroad corporation for the transportation of any passengers or freight or cars, or unjust discrimination in

relation thereto, be deemed and taken in all courts of this State as *prima facie* evidence that the rates fixed therein are reasonable maximum rates of charges for the transportation of passengers and freights and cars upon the railroads for which said schedules may have been respectively prepared. Said commissioners shall, from time to time, as often as circumstances may require, change and revise said schedules. [Annotated Code (1896), chap. 114, ¶ 173.]

This legislation is constitutional. Chicago, B. & Q. R. R. v. Jones, 149 Ill. 361, 37 N. E. 247 (1894); Ruggles v. Illinois, 108 U. S. 526, 27 L. Ed. 812 (1882). See, as to the functions of the Commission, St. Louis, A. & T. H. R. R. v. Hill, 11 Ill. App. 248 (1883), and St. Louis & C. R. R. v. Blackwood, 14 Ill. App. 503 (1884).

§ 1257. **Indiana.**

The Commission shall have power as hereinafter provided and it shall be its duty from time to time, to alter, change, amend or abolish any classification or rate established by any railroad company or companies whenever found to be unjust or discriminative, and such amended, altered or new classifications or rates shall be put into effect by said railroad company or companies.

The Commission may adopt and enforce such rules, regulations and modes of procedure as it may deem proper, to hear and determine complaints that may be made against the classifications or the rates maintained by the common carriers subject to the provisions of this Act, or against the rules, regulations and determinations of the Commission. The Commission shall enforce as hereinafter provided, reasonable and just rates of charges for each railroad company subject hereto for the use or transportation of loaded or empty cars on its roads; and may so enforce for each railroad, or for all railroads alike, reasonable rates for storing and handling of freight and for the use of cars not unloaded after forty-eight hours' notice to the consignee, not to include Sundays or legal holidays. The Commission shall enforce reasonable rates, as hereinafter provided, for the trans-

portation of passengers over each or all of the railroads subject hereto, which rates shall not exceed the rates fixed by law. The Commission shall have power to enforce reasonable rates, tolls or charges for all other service performed by any railroad subject hereto.

The provisions of this section shall be construed to mean that the Commission shall have power to correct, alter, change, or establish rates, charges, classifications, rules or regulations where the railroads or express companies respectively, or any of them, fail to have just and reasonable and indiscriminative rates, charges, classifications, rules and regulation[s] in operation and effect, and shall exercise such power only where some person or corporation is injuriously affected by such rate, charge, classification, rule, or regulation, shall have filed with said Commission a written verified complaint setting forth the unreasonable character of the rate, charge, classification, rule or regulation complained of, and when any such complaint shall have been filed, the said Commission shall have power to proceed to hear and determine said complaint and consider the reasonableness of such rate, charge, classification, rule or regulation, after the notice provided for in section 4 of this Act has been given, and after such hearing shall make such corrections, alterations, changes or new regulations, or any part thereof as may be necessary to prevent injustice and discrimination to the party complaining: *Provided,* that any such rate, charge, or classification, rule or regulation shall have been changed or modified by any order of said commission, such order shall operate for the benefit of all persons or corporations, situated similarly with said complaining party and on the line of said railroad complained of: *Provided further,* That at any hearing provided for in this section, all oral testimony heard by the Commission shall be taken down in shorthand, and all documentary evidence heard or considered, and all pleadings and other papers pertaining to such hearing shall be kept on file in the office of the Commission, so that a complete transcript of all such proceedings, including all

the evidence, may be made whenever required. [Acts of 1905, ch. 53, section 3.]

§ 1258. **Iowa.**

Commissioners' schedules of rates—effect. The schedules of reasonable maximum rates of charges for the transportation of freight and cars, together with the classification of such freights now in effect, shall remain in force until changed by the board according to law, which, in all actions brought against railway corporations, wherein there are involved the charges thereof for the transportation of any freight or cars, or any unjust discrimination in relation thereto, shall be taken as *prima facie* evidence in all courts that the rates fixed therein are reasonable and just maximum rates of charge for which said schedules have been prepared. The board shall from time to time, and as often as circumstances may require, change and revise such schedules, but the rates fixed shall not be higher than established by law. [Code (1897), section 2138.]

The general principles to be employed by the courts in passing upon the rates by the Commission are set forth in Chicago & N. W. Ry. v Dey, 35 Fed. 866 (1888). A schedule of rates under this section having been adopted by the Commissioners, remains in force until the publication of a change in rates as herein provided. Hopper v. Chicago, M. & St. P. Ry., 9 Iowa, 639, 60 N. W. 487 (1898).

§ 1259. **Kansas.**

Sec. 4. The power and authority is hereby vested in the Board of Railroad Commissioners, and it is hereby made its duty to supervise all railroad freight and passenger schedules of rates, tariffs, and classifications, and all rules and regulations governing car service, the transfer and switching of cars from one railroad to another at junction points or where entering the same city or town, all charges to be made therefor, as well as the rules and regulations adopted by any railroad company for the operation of its road in the running of trains. It shall be the duty of said board, from time to time, to alter, change or amend

any such schedule, classification, rate, rule or regulation established by any railroad company or companies which the board, upon complaint as hereinafter provided, may find to be unreasonable, unjust or discriminative; and such amended, altered or new schedule, classification or rate, rule or regulation shall be put into effect by such railroad company or companies within not more than thirty days after receiving written notice of the order of the board: *Provided,* That before such order is made by the board, notice and a hearing shall be given, as required in section 9 of this Act. [Laws of 1905, ch. 340.]

§ 1260. **Kentucky.**

When complaint shall be made to the Railroad Commission, accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this commonwealth, or when said Commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employee of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, argument or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is, or has been guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the Commission shall be entered and be an order on the record book of their office, and signed by the Commission and a copy thereof mailed to an officer, agent or employee of the railroad company or corpora-

tion affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. [Laws of 1900, ch. 2, section 1.]

See McChord v. Cincinnati, N. O. & T. P. R. R., 183 U. S. 483, 46 L. Ed. 289, 22 Sup. Ct. 165 (1901), reversing Louisville & N. Ry. v. McChord, 103 Fed. 216 (1900), and holding that no repeal of the provisions of Ky. Gen. Stat. 1894, § 819, that prosecution by indictment of railroad companies for charging unlawful rates shall be had only on recommendation or request of the railroad commission, and also for an action in the name of the commonwealth on information filed by the board of railroad commissioners, was effected by Ky. act March 10, 1900, providing for the fixing of rates by such Commission, although, while repeating many of the provisions of the section, it omitted these provisions.

§ 1261. Louisiana.

Art. 284. The power and authority is hereby vested in the Commission and it is hereby made its duty, to adopt, change or make reasonable and just rates, charges and regulations; to govern and regulate railroad, steamboat and other water craft, and sleeping-car, freight and passenger traffics, and service, express rates, and telephone and telegraph charges, to inspect railroads and to require them to keep their tracks and bridges in a safe condition, and to fix and adjust rates between branch or short lines and the great trunk lines with which they connect, and to enforce the same by having the penalties hereby prescribed inflicted through the proper courts having jurisdiction.

The Commission shall have power to adopt and enforce such reasonable rules and regulations and modes of procedure, as it may deem proper for the discharge of its duties and to hear and determine complaints that may be made against the classification or rates it may establish, and to regulate the mode and manner of all investigations and hearings of railroad companies and other parties before it, in the establishment of rates, orders charges and other acts, required or authorized by these provisions. They shall have power to summon and compel the at-

tendance of witnesses, to swear witnesses, and to compel the production of books and papers, to take testimony under Commission and to punish for contempt as fully as is provided by law for the district courts. [Constitution (1898), art. 284.]

That power and authority is hereby vested in and given to the Railroad Commission of Louisiana and it is hereby made its duty to require all railroad and other common carriers doing business in this State, upon the demand of any person or persons, firm, partnership or corporation to adopt and make, and thereafter, when necessary, to change reasonable and just joint through rates and charges for the transportation of freight between points within this State, whether such shipments be made entirely by railroads or by water transportation, or partly by railroads and partly by water, or whether, when made by railroads alone, such freight is forwarded in carloads or less than carload shipments.—[Acts of 1904, No. 24, section 1.]

§ 1262. **Maine.**

Any railroad corporation may establish and collect, for its sole benefit, fares, tolls and charges, upon all passengers and property conveyed and transported on its railroad, at such rates as may be determined by the directors thereof, and shall have a lien on its freight therefor; and may from time to time by its directors regulate the use of its road; *Provided,* That such rates of fares, tolls and charges, and regulations are at all times subject to alteration by the legislature, or by such officers or persons as the legislature may appoint for the purpose, anything in the charter of such corporation to the contrary notwithstanding; and *Provided further,* That upon what shall, at any time, be deemed by the railroad commissioners a sufficient complaint, by interested and responsible parties, that the tolls are unreasonably high, said commissioners may revise and establish them, after due notice and hearing, for a time not exceeding one year. But the commissioners before directing said hearing, shall give op-

portunity to the company complained of, to reply to the charge. [Revised Statutes (1903), ch. 52, section 1.]

See State v. Goold, 53 Me. 279 (1865).

§ 1263. **Minnesota.**

Upon the verified complaint of any person or of any corporation, private or municipal, that any tariff of rates, fares or charges, or any part thereof, or of any classification is unequal or unreasonable, the Commission shall proceed to investigate the matters alleged in such complaint, and for the purposes of such investigation they may require the attendance of witnesses and the production of books, papers and documents. If, upon the hearing, such tariff of rates, fares, or charges, or any part thereof, or of such classification, is found to be unequal or unreasonable, the committee shall make an order stating wherein the same are so unequal or unreasonable, and shall make a tariff of rates, fares, charges and classification which shall be substituted for the tariff so complained of. The tariff so made by the Commission shall be deemed *prima facie* reasonable in all courts and shall be in full force during the pendency of any appeal or other proceedings to review the action of the Commission in establishing the same. [Revised Laws (1905), section 1969.

Any common carrier desiring to change or discontinue any published rate, charge or classification, minimum weight or rule governing the same to which it is a party, shall make application to the Commission in writing, stating the changes in rules, rates, charges or clasifications desired, giving the reasons for such change. Upon receiving such application, the Commission shall fix a time and place for hearing, and give such notice to interested parties as it shall deem proper and reasonable, and after hearing all the evidence offered, if the Commission find that it is reasonable, fair and just to both shippers and carriers that the change should be allowed as asked for, it shall grant the application; otherwise, it shall deny the same, or may grant the

same in a modified form. Passenger rates are not affected by this Act. [Laws of 1905, ch. 176, section 5.]

The leading cases in Minnesota upon the power of the Commission in dealing with rates are Steenerson v. Gt. Northern Ry., 69 Minn. 353, 72 N. W. 713 (1897), and State v. Minneapolis & St. L. Ry., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514 (1900). The doctrine of these cases is that particular rates may be reduced by the Commission provided that a fair return is left upon the schedule as a whole. And it is regarded that a fair return is left when a reasonable percentage upon the replacement value of the property is earned over necessary annual expenditures.

§ 1264. Mississippi.

It is the duty of every railroad to furnish to the Commission its tariff of charges for transporting passengers and freight from point to point within, and from points without to points within, and from points within to points without the State, and including all joint tariffs with connecting lines; and the Commission shall revise such of said tariffs as are not subject to the exclusive regulation of Congress, and determine whether or not, and in what particular, any of the charges are more than reasonable compensation for the services to be rendered, and whether or not discrimination be made improperly against any person, corporation or locality; and it shall require the proper corrections to be made; and when the tariffs have been corrected, the Commission shall append to each its certificate of approval; and the Commission shall fix and regulate tariffs of charges for all railroads which fail to furnish their tariffs as required. In revising, fixing and regulating charges for transportation, the Commission shall take into consideration the character and nature of the service to be rendered, and the entire business of the railroad, and its earnings from all kinds of traffic; and shall so revise, fix and regulate the charges as to allow reasonable compensation for the services to be rendered. It shall exercise a watchful and careful supervision over the tariffs of charges of every railroad, and shall revise the same from time to time, as justice to the public and the rail-

road may require, and shall increase or reduce any of the rates, experience and business operations show to be just. In fixing joint tariffs of rates, for connecting lines, the Commission shall determine the proportion to be charged by each of the railroads. The Commission shall regulate and fix the rates to be charged on short hauls in excess of what may be charged on long hauls, and it shall determine in all cases whether the circumstances and conditions be or be not substantially similar. [Annotated Code (1902), section 4290.]

The State has the right, as a general proposition, to prescribe the compensation a railroad shall receive for carrying passengers and freight within its borders. Stone v. Yazoo R. R. Co., 62 Miss. 607 (1884).

The State may supervise railroads, and regulate their charges through a Commission. Stone v. Natchez R. R. Co., 62 Miss. 646 (1884).

And the State may give the Commission power to rectify abuses in rates. Alabama Ry. v. Railroad Com., 38 So. 356 (1905).

§ 1265. Missouri.

Said railroad commissioners shall have power to classify all articles of freight transported on any railroads or parts of railroads, owned, leased, or occupied in the State, except the articles in the special classes D, E, G and H, placing said articles in either of the general classes herein provided for, or in any of said special classes, except D, E, G and H; and are further empowered and authorized to reduce said rates on any of said railroads or parts of railroads, either in general or in special classes, whenever in their judgment, it can equitably be done. [Revised Statutes (1899), section 1204.]

§ 1266. Nebraska.

That the board hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provision of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain such common carriers full and complete information necessary to enable the

board to perform the duties and carry out the objects for which it was created; and for the purposes of this Act the board shall have power to require the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation, and to that end may invoke the aid of any of the District Courts in this State, or of the Supreme Court, in requiring the attendance and testimony of witnesses, and the production of books, papers and documents under the provisions of this section; and any court of competent jurisdiction, within the jurisdiction of which such inquiry is carried on, may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act or other person, issue an order requiring such common carrier or other person to appear before said board (and produce books and papers if ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. [Compiled Statutes (1899), section 4056.]

See State v. Sioux City, etc., R. R., 46 Neb. 682, 65 N. W. 766 (1896), and Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898), for general principles to be employed in passing upon the reasonableness of rates.

§ 1267. **New Hampshire.**

In such case, if a railroad corporation shall not establish a tariff for the transportation of milk by the can, or if any person is aggrieved by the tariff established, the board of railroad commissioners, upon petition, after notice and hearing, shall establish such tariff as they shall deem to be fairly

proportionate to the rates charged by the corporation for the transportation of milk in large quantities, and shall notify the corporation thereof. [General Laws (1903), chap. 160, section 22.]

§ 1268. **North Carolina.**

That the said Commission is hereby empowered and directed: (1) To make reasonable and just rates of freight, passenger and express tariffs for railroads, steamboats, canal and express companies or corporations, and all other transportation companies or corporations engaged in the carriage of freight, express or passengers: *Provided,* That in fixing any maximum rate or charge or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this Act the said Commission shall take into consideration if proved or may require proof of the fair value of the property of such carrier, person or corporation used for the public in the consideration of such rate or charge or the fair value of the service rendered as in determining the fair value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of the construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all its property within the State of North Carolina; the provable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation and all other facts that will enable them to determine what are reasonable and just rates, charges and tariffs. [Laws of 1899, chap. 164, section 2.]

The powers of this Commission were considered at length in Matthews v. Board of Corp. Comm'rs, 106 Fed. 7 (1901). It was held in that case that the Commission must not so reduce rates as to prevent the railroad from earning a fair return upon the present value of its property, but that rates on a particular article might be fixed at any reasonable rate provided the schedule as a whole produced an adequate return.

§ 1269. **North Dakota.**

Before proceeding to make such examination, in accordance with such application or petition, said commissioners shall give to the petitioners and the railroad, railroad corporation, or common carrier reasonable notice in writing of the time and place of entering upon the same. If, upon such an examination, it shall appear to said commissioners that the complaint alleged by the applicant or commissioners is well founded they shall so adjudge, and shall inform the corporation operating such railroad or such railroad corporation or common carrier of their adjudication within ten days, and shall also report their doings to the governor, as provided in the second section of the Act. [Laws of 1897, chap. 115, section 8.]

The powers of this Commission under the various clauses of Laws of 1897, Ch. 115, were discussed in No. Pacific Ry. v. Keyes, 91 Fed. 47 (1898), where it was held that the railroad must be left a fair return upon their State business without regard to their interstate business.

§ 1270. **South Carolina.**

The commissioners elected as hereinbefore provided shall, as provided in the next section of this chapter, make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this State on the railroads therein, but said passenger rates shall not exceed the maximum prescribed in section 2165; they shall make reasonable and just rules and regulations to be observed by all railroad companies doing business in this State, as to charges to any and all points for the necessary hauling and delivery of all freights; shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discrimination in the transportation of freight and passengers on the railroads in this State; shall have the power to make just and reasonable joint rates for all connecting roads doing business in this State, as to all traffic or business passing from one of said roads to another, and to require the making of such connection at intersecting points of the schedules of trains as the public convenience may in their judgment demand: *Pro-*

vided, however, That before applying joint rates to roads that are not under the management and control of one and the same company the commissioners shall give thirty days' notice to said roads of the joint rate contemplated and of its division between said roads, and give hearing to roads desiring to object to the same; shall make reasonable and just rates of charges for use of railroad cars carrying any and all kinds of freight and passengers on said railroad, no matter by whom owned or carried, and shall make just and reasonable rules and regulations to be observed by said railroad companies or railroads, to prevent the giving or paying of any rebate or bonus, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers: *Provided,* That nothing in this chapter shall be taken as in any manner abridging or controlling the rates for freight charged by any railroad company in this State for carrying freight which comes from or goes beyond the boundaries of the State, and on which freight less than local rates on any railroad carrying the same are charged by such railroad, but said railroad companies shall possess the same power and right to charge such rates for carrying such freights as they possessed before the passage of this chapter, and commissioners shall have full power, by rules and regulations, to designate and fix the difference in rates of freight and passenger transportation to be allowed for shorter and longer distances on the same or different railroads, and to ascertain what shall be the limit of longer and shorter distances. [Civil Code (1902), section 2092.]

§ 1271. **Tennessee.**

And it shall be the duty of said Commission to exercise a careful and watchful supervision over every such tariff or charges from time to time, as justice to the public and each of said railroads may require, and to increase or reduce any of said rates according as experience and business operations may

show to be just; and said Commission shall accordingly fix the tariffs of charges for these railroads failing to furnish tariff of charges as above required. [Laws of 1897, chap. 10, section 22a.]

§ 1272. **Texas.**

The power and authority is hereby vested in the Railroad Commission of Texas, and it is hereby made its duty, to adopt all necessary rates, charges and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and to enforce the same by having the penalties inflicted as by this chapter prescribed through proper courts having jurisdiction.

1. The said Commission shall have power, and it shall be its duty, to fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this State into such general and special classes or subdivisions as may be found necessary and expedient.

2. The Commission shall have power, and it shall be its duty, to fix to each class or subdivision of freight a reasonable rate for each railroad subject to this Act for the transportation of each of said classes and subdivisions. [Revised Statutes (1895), art. 4562.]

In Railroad Commission v. Weld & N., 96 Tex. 394, 73 S. W. 529 (1903), it was held that plaintiff in an action against the Railroad Commission does not, as required by Rev. St. 1895, art. 4566, show that the freight rate on cotton made by it is unreasonable and unjust to him because there is no car rate, and because it is the same amount per 100 pounds whether pressed to a density of 40 pounds to the cubic foot, as shipped by him, or to a density of only 22½ pounds, as shipped by others.

In Gulf, C. & S. F. Ry. v. State (Tex. Civ. App.), 73 S. W. 429 (1903), it was held that where corn was reconsigned at T., a point within the State, the interstate shipment terminated at T., and that the further ship-

ment to G. was intrastate business, for which defendant was only entitled to charge the rate fixed by the Texas Railroad Commission.

The fullest discussion of the powers of this Commission is to be found in Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683 (1898), where it is held that the Commission must not so reduce rates as to deprive the railroad of a fair return upon its investment.

§ 1273. Virginia.

The Commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the Commission shall, from time to time, prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the Commission may, from time to time to come, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void. [Constitution (1904), section 156 (6).]

§ 1274. Wisconsin.

Section 14. Whenever, upon an investigation made under the provisions of this Act, the Commission shall find any existing rate or rates, fares, charges or classifications, or any joint rate or rates, or any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith, are unreasonable or unjustly discriminatory, or any service is inadequate, it shall determine and by order fix a reasonable rate, fare, charge, classification or joint rate

to be imposed, observed and followed in the future in lieu of that found to be unreasonable or unjustly discriminatory, and it shall determine and by order fixe a reasonable regulation, practice or service to be imposed observed and followed in the future, in lieu of that found to be unreasonable, or unjustly discriminatory, or inadequate as the case may be, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the railroad affected thereby, which order shall of its own force take effect and become operative twenty days after the service thereof. All railroads to which the order applies shall make such changes in their schedule on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any railroad in any such rates, fares or charges, or in any joint rate or rates, without the approval of the Commission. Certified copies of all other orders of the Commission shall be delivered to the railroads affected thereby in like manner, and the same shall take effect within such times thereafter as the Commission shall prescribe. [Laws of 1905, chap. 362.]

§ 1275. **Washington.**

That the freight and passenger tariffs, charges for transportation of loaded or empty cars, charges for demurrage, and reciprocal demurrage, truckage, train service, waiting rooms for passengers and rooms for freight and baggage at all stations of railroads, and charges for each kind and class of property, money, papers, packages and all other things to be charged for and received by each express company on all such property, money, papers, packages and things which by the contract to carry are to be transported by said express company, to be demanded, collected, enforced, or performed by railroad or express companies shall be just, fair, reasonable, and sufficient, and the said Railroad Commission of Washington is hereby vested with power and authority, upon complaint made as here-

inafter provided or by inquiry upon their own motion, after a full hearing, to make any finding declaring any existing rate for the transportation of person or property, or any regulation whatsoever affecting said rate or charge for transportation of loaded or empty cars or demurrage or reciprocal demurrage or the sufficiency of the train service and waiting rooms for passengers and rooms for freight and baggage to be unreasonable, or unjustly discriminatory, or insufficient, and to declare and order what shall be a just and reasonable rate, practice, regulation or thing to be charged, imposed, enforced, or performed or followed in the future in the place of that found to be unreasonable or unjustly discriminatory or insufficient; and the order of the Commission shall of its own force take effect and become operative twenty days after notice thereof has been given to the railroad or express company affected thereby; which said order shall be served on railroad and express companies by delivery of a certified copy thereof under the seal of the Commission, either to the attorney for the railroad or express company or the said company itself. [Laws of 1905, ch. 81, section 3.]

§ 1276. **Conclusion.**

Certain generalizations may be drawn from this collection of statutory provisions. In the first place the general powers of these commissions are considerable and are increasing. In a majority of States they have power to pass upon rates; and in a majority of these they have power to fix rates, their power in this last respect being established with greater detail than ever before, many States within a few years having passed new and sweeping legislation. Upon the whole, the tendency of the times is plainly to give to the Railroad Commissions the power to fix rates.

CHAPTER XLI.

STATUTORY PROVISIONS FOR COURT REVIEW.

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§ 1281. Introduction.

It has appeared at various points in the course of this treatise that it is practically impossible under our American constitutional system to exclude altogether the possibility of resort to the judicial courts by complainants who seek to show that they are being deprived of life, liberty and property without due process of law. For the courts consistently maintain the position in recent times that there is deprivation of property if the rates which a railroad establishes are interfered with in an outrageous manner without showing of justification. In recognition of this situation it has become common in the more recent statutes to accept the conditions frankly, and to provide a regular method of access to the courts. Extracts from these statutes are included in this chapter, so that the reader may study this matter comparatively, if he be so minded.

§ 1282. Alabama.

That whenever any person or corporation operating a railroad fails or refuses to comply with any order of the Railroad Commission, it shall be the duty of said Commission, through its president to certify to the attorney-general the facts of such failure

or refusal together with a certified copy of the order made by said Commission in such matter, whereupon it shall be the duty of the attorney-general or some attorney at law, to be by him appointed, to immediately file in the circuit, chancery, city court or court of like jurisdiction, appropriate pleadings in the way of complaint, petition, or bill as may be in accordance with the rules of pleading and practice in such cases, or cases of similar nature, setting out the name and the style of the case heard before the railroad commission, the relief asked for, and the order of the Commission granting such relief, or if such order is made by the Commission on its own motion, such statement shall simply set out the order of the Commission, the name of the railroad or railroads to which such order was directed, with the averment that said railroad or railroads have refused or failed, within the time required by such order to comply therewith, and conclude with the prayer that such railroad or railroads be compelled by mandamus or injunction to carry out said order of the Railroad Commission. [Laws of 1903, No. 94, section 25.]

That upon the trial of said cause the order of the railroad commission shall be *prima facie* evidence that the thing ordered to be done was correct, reasonable, and just, and the burden of showing that such order is not correct, reasonable and just shall be upon the railroad or railroads failing or refusing to comply with the order of said Railroad Commission. [Ibid, section 26.]

That upon the final hearing of said cause either party may appeal within thirty days from the judgment of said court to the Supreme Court of Alabama. Said Railroad Commission may take such appeal without filing any bond. But said railroad or railroads shall, before taking such appeal, be required to enter into bond with good and sufficient security in such sum as may be required by the judge of the court trying such case, and which, in the judgment of said judge, may be sufficient to pay the costs of said suit and all damages growing out of said suit to any person by reason of the delay of the enforcement of

the order of said Railroad Commission, and said bond to be approved by said judge of said court. [Ibid, section 29.]

§ 1283. **Arkansas.**

The Commission shall institute such action and actions for the recovery of the penalties prescribed in this act, through the prosecuting attorney of the proper district, and no such suit shall be dismissed or compromised without the consent of the court and of said commissioners; and the prosecuting attorney shall be allowed a fee by the court not to exceed twenty-five per cent. of the amount collected; and if any prosecuting attorney shall neglect for fifteen days after notice to bring suit, the Commission may employ some other attorney at law to bring the same, who shall be allowed a fee therefor to be fixed by the court, not to exceed twenty-five per cent. of the amount collected, and in such case the prosecuting attorney shall not interfere: *Provided,* That in all trials of cases brought for a violation of any tariff charges by said Commission, it may be shown in defense that such tariff so fixed was unjust. [Digest of Statutes (1904), section 6380.]

If any person or corporation operating a railroad or express company in this State, or any receiver, trustee, or lessee of any such person of corporation as aforesaid, shall violate any of the provisions of said act, or aid or abet therein, or shall violate the tariff of charges as fixed by the Commission, or any of the rules regarding railroads or express companies as made by said Commission, and for which there is no other penalty prescribed in this act, such person or corporation, or receiver, trustee, or lessee shall be liable to a penalty not less than five hundred nor more than three thousand dollars for each violation of this act, or such tariff of charges or rules and regulations, and such penalty may be recovered by an action to be brought in the name of the State of Arkansas, in the county in which such violation may occur. The Commission shall institute such action and actions for the recovery of the penalties prescribed in this act,

through the prosecuting attorney of the proper district, and no such suit shall be dismissed or compromised without the consent of the court and of said commissioners; and the prosecuting attorney shall be allowed a fee by the court not to exceed twenty-five per cent. of the amount collected, and if any prosecuting attorney shall neglect for fifteen days after notice to bring suit the commission may employ some other attorney at law to bring the same, who shall be allowed a fee therefor to be fixed by the court, not to exceed twenty-five per cent. of the amount collected, and in such case the prosecuting attorney shall not interfere: *Provided*, That in all trials of cases brought for a violation of any tariff charges by said commission, it may be shown in defense that such tariff so fixed was unjust. [Ibid, 6831.]

§ 1284. **Florida.**

The said railroad commissioners are hereby vested with judicial powers to do or enforce or perform any function, duty, or powers conferred upon them by this act to the exercise of which judicial power is necessary. [Laws of 1899, ch. 4700 (No. 39), section 22.]

Appeals by either party shall be from judgments, orders, and decrees of inferior courts in all suits and cases brought under the provisions of this act to the same extent that appeals lie in similar suits and cases brought under any other law in this State, and not otherwise. [Ibid, section 23.]

§ 1285. **Indiana.**

If any railroad company or other corporation or party in interest shall be dissatisfied with any rate, classification, rule, charge, or general regulation made, approved adopted, or ordered by the Commission, such dissatisfied company or party may, within sixty days after any such action has been taken by the Commission, procure from the secretary of the Commission, whose duty it shall be to furnish the same, a complete transcript of all the proceedings of the Commission relative thereto,

and if he or it so desires a copy of all the evidence heard or considered by the Commission at the hearing at which such action or decision was made, which evidence shall be incorporated into such transcript, and such dissatisfied company or party may file said transcript, with a concise written statement of its or his causes of complaint against the action of the Commission, in the office of the clerk of the appellate court of Indiana within thirty days after procuring the same and not later than ninety days after the action of the Commission complained of has been spread upon its records. Said complaining company or party shall, at the time of filing such transcript, give or cause to be given to said Commission written notice thereof, and shall, within five days thereafter, file proof of such notice in the office of said clerk of the appellate court, who shall, ten days thereafter, or upon the appearance of said Commission to said appeal, place said cause upon the docket of the said appellate court for hearing and determination. The commission shall be made a party to such proceeding in the appellate court and shall defend the same. [Laws of 1905, ch. 53, section 6.]

Provided, however, That if at the time of filing a transcript in the office of the clerk of the appellate court of Indiana, as provided in section 6, appealing from the action of said Commission in fixing or changing any rate or charge of any common carrier for the transportation of freight or passengers, the railroad company or other common carrier filing such petition shall also file a bond in such amount as shall be fixed by the court and with surety to the satisfaction of such court, conditioned for the payment to the commission for the use of all persons who may be injuriously affected by such proceeding, of any and all amounts in which any of such persons may be damaged thereby, and for the refunding to each shipper or passenger of all overpayments of freight or passenger charges made by him to such complaining carrier pending such proceeding, and for the prompt payment of all penalties provided for herein, to which any or all such shippers may be entitled, then, in such case the

said complaining carrier may charge to and collect from all shippers of freight and all passengers on its said line or lines, the same rate for freight received by it and transported, or the same passenger rate that existed before the making of the order by the said Commission which is complained of in said proceeding until such proceeding is finally determined by said court. [Ibid, section 6 1-2.]

§ 1286. **Kansas.**

In case any railway company shall charge and receive any rate for the transportation of freight in excess of the rate authorized by the board of Railroad Commissioners, and if the rate authorized by the board of Railroad Commissioners shall be reasonable and just, then said railroad company shall repay the amount so charged or received in excess of the rate fixed by the board of railroad commissioners, on demand therefor; and in case of failure to repay any such amounts within thirty days after such demand, the amount thereof may be recovered together with reasonable attorney fees in an action brought for that purpose in any court of competent jurisdiction: *Provided,* That if such railroad company shall within thirty days after such decision or determination by said board bring suit to test the reasonableness of such rates, no suit shall be brought for said excess until such rates have been adjudicated. [Laws of 1905, ch. 340, section 9.]

§ 1287. **Louisiana.**

If any railroad, express, telephone, telegraph, steamboat and other water craft, or sleeping-car company, or other party in interest, be dissatisfied with the decision or fixing of any rate, classification, rule, charge, order, act, or regulation, adopted by the Commission, such party may file a petition setting forth the cause or causes of objection to such decision, act, rule, rate, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction, at the domicile of the Commis-

sion, against said Commission as defendant, and either party to said action may appeal the case to the Supreme Court of the State, without regard to the amount involved, and all such cases, both in the trial and appellate courts, shall be tried summarily, and by preference over all other cases. Such cases may be tried in the court of the first instance either in chambers, or at term time; *Provided,* All such appeals shall be returned to the Supreme Court within ten days after the decision of the lower court; and where the Commission appeals, no bond shall be required. [Constitution (1898), article 285.]

§ 1288. **Minnesota.**

Any party to a proceeding before the Commission and affected by any order thereof not administrative, or any party affected by the order, or the attorney-general, may appeal therefrom to the District Court of the county in which the complainants or a majority of them, reside, or in case none of them reside in the State, to the District Court of any county in which the carrier or warehouseman, if a corporation, has an office, agent, or place of business, at any time within thirty days after service of such order upon him as in this chapter provided by service of written notice of appeal upon the secretary of the Commission. Such secretary shall thereupon file with the clerk of such court all papers and records in the proceeding. [Revised Laws (1905), section 1971.]

Upon filing such notice with proof of service with the clerk, the matter shall be pending as a civil action in such court. The court shall try the case *de novo* and render such order therein as may be just and proper, which shall stand in place of the original order. No such appeal shall stay or supersede the order appealed from, unless the court, upon hearing and notice to the adverse party, shall so direct. [Ibid, section 1972.]

Any party to an appeal or other proceeding in the District Court under the provisions of this chapter may appeal from the final judgment, or from any final order therein, in the same

cases and manner as in civil actions. No bond shall be required from the Commission, and no such appeal shall stay the operation of such order or judgment unless the District or Supreme Court shall so direct, and unless the carrier appealing from a judgment or order fixing rates for transportation of persons or property shall give bond in a sum and with sureties approved by a judge of the court ordering the stay, conditioned that the appellant will refund to the person entitled thereto any amount received for such transportation above the amount finally fixed by the court. Any person paying such excessive charges shall have a claim for the excess, whether paid under protest or not, and, unless refunded within thirty days after the written demand made after final judgment, may recover the same by action against such carrier, or such carrier and the sureties on such bond. The appeal may be filed in the Supreme Court before or during any term thereof, and shall be immediately entered on the calendar and heard upon such notice as the court may prescribe. [Ibid, section 1980.]

In Steenerson v. Gt. Northern Ry., 69 Minn. 353, 72 N. W. 713, B. & W. 333 (1897), it was held that the fixing of rates was a legislative or administrative act, not a judicial one, and under the Constitution the court cannot place itself in the position of the Commission, and try *de novo* the question what are reasonable rates; but upon appeal the court should only seek to know whether the rates fixed by the Commission are unreasonble and confiscatory.

Later in State ex rel. v. Minneapolis & St. L. R. R., 80 Minn. 191, 83 N. W. 60 (1900), it was said that the rates made by the Commission were *prima facie* reasonable, the burden being upon the carrier to prove the contrary; but the carrier, it was held, was entitled to an examination into the facts of the case, in the course of which evidence *de novo* might be taken.

§ 1289. **Mississippi.**

The Commission may apply to the Circuit or Chancery Court, by proper proceeding, for aid in the enforcement of obedience to its process, and to compel compliance with the law and its lawful orders, decisions and determinations; and said courts

shall have jurisdiction to grant aid and relief in such cases, subject to right of appeal to the Supreme Court by the party aggrieved. [Annotated Code (1902), section 4286.]

§ 1290. **Missouri.**

Where the complaint involves either a private or a public question as aforesaid, and the commissioners have made a lawful order or requirement in relation thereto, and where such common carrier, or the proper officer, agent or employee thereof, shall violate, refuse or neglect to obey any such order or requirement, it shall be lawful for the board of railroad commissioners, or any person or company interestd in such order or requirement, to apply in a summary way, by petition, to any circuit court at any county in this State into or through which the line of railway of the said common carrier enters or runs, alleging such violation of said obedience, as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable. And such notice may be served on such common carrier, its officers, agents, or servants in such manner as the court may direct; and said court shall proceed to hear and determine the matter speedily in such manner as to do justice in the premises; and to this end said court shall have power, if it thinks fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as may seem needful to enable it to form a just judgment in the matter of such petition. On such hearing the report of said Commissioners shall be *prima facie* evidence of the matter therein stated; and if it be made to appear to the court on such hearing, or on report of such persons appointed as aforesaid, that the lawful orders or requirements of such Commissioners drawn in question have been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory, or otherwise, to restrain such common carrier from further continuing such violation of such

order or requirement of said commissioners and enjoin obedience to the same. . . When the subject in dispute shall be of the value of one hundred dollars or more, either party to such proceeding before such court may appeal to the proper appellate court in the State, in the same manner that appeals are taken from such courts in this State in other proceedings involving like sums of money; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon, unless stay of proceedings be ordered by the court from which the appeal is taken, or by the appellate court to which the appeal is taken, upon the application of the appealing party. Whenever any such petition shall be filed by the commissioners as aforesaid, it shall be the duty of the attorney-general, when requested by said commissioners, to prosecute the same. All proceedings commenced upon such petition shall, upon application of the petitioner, be advanced upon the docket and take precedence of any other case upon the docket except criminal cases. [Revised Statutes (1899), section 1150.]

§ 1291. **North Carolina.**

The schedule containing rates fixed by said Commission shall, in suits brought against any such company wherein is involved the charges of any such company for the transportation of any passenger or freight or cars, or unjust discrimination in relation thereto, to be taken in all courts of this State as *prima facie* evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads: *Provided,* That any company may appeal to the judge of the Superior Court in term time and thence to the Supreme Court from any determination of the Commission fixing or refusing to change the rate of freight or fare. [Laws of 1899, ch. 164, section 7.]

§ 1292. **North Dakota.**

Any railroad, railroad corporation, or common carrier subject to the provisions of this article, or any other person interested in the order made by the commissioners of railroads may appeal to the district court of the proper county in the judicial district of this State from which the complaint arose, and which is the subject and basis of the order, from any order made by the commissioners of railroads regulating or fixing its tariffs or rates, fares, charges, or classifications, or from any other order made by said commissioners under the provisions of this article by serving a notice in writing upon the secretary of said commissioners, or any one of said commissioners, within twenty days after such railroad, railroad corporation, or common carrier shall receive notice from such commissioners of the making and entry of such order. . . . Any railroad, railroad corporation, or common carrier, the commissioners of railroads, or any party interested in the decision of said court may appeal from the decision of the district court to the supreme court of this State by serving a notice of such appeal upon the opposite party within twenty days after the rendition of such decision and service of notice thereof. [Revised Codes (1899), section 3039.]

§ 1293. **South Dakota.**

Whenever any common carrier, as defined in and subject to the provisions of this article shall violate or refuse or neglect to obey any lawful order or requirement of the said board or railroad commissioners, it shall be the duty of said commissioners, and lawful for any company or person interested in such order or requirement, to apply in a summary way, by petition to the Circuit Court in any county of this State in which the common carrier complained of has its principal office, or in any county through which its line of road passes or is operated, or in which the violation or disobedience of such order or requirement may happen, alleging such violation or disobedience as the case may

be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable, and such notice may be served on such common carrier, it or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of such commissioners shall be *prima facie* evidence of the matter therein, or in any order made by them stated; and if it be made to appear to such court that on such hearing on the report of any such person or persons that the order or requirement of said commissioners drawn in the question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission and enjoining obedience to the same; and in case of any disobedience of such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and, if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other process, mandatory or otherwise; and said court may, if it think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or

other process, mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of one thousand dollars for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other process, mandatory or otherwise; and such moneys shall, upon the order of the court, be paid into the treasury of the county in which the action was commenced, and one-half thereof shall be transferred by the county treasurer to the State treasury; and the payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order, in the nature of a writ of execution in like manner, as if the same had been recovered by a final decree *in personam* in such court, saving to the commissioners and to any other party or person interested (in?) the right to appeal to the Supreme Court of the State under the same regulations now provided by law in relation to appeals to said court as to security for such appeal, except that in no case shall security for such appeal be required when the same is taken by said commissioners. [Political Code, section 449.]

§ 1294. **Texas.**

If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act, or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis county, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said

appellate court of all causes of a different character therein pending: *Provided,* That if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice. [Revised Statutes (1895, article 4565.]

In Railroad Commission v. Houston & T. C. R. R., 90 Tex. 340, 38 S. W. 750 (1890), it was held as to proceedings under this section that, if any railroad company is dissatisfied with any rule or regulation adopted by the railroad commission, it may file a petition in court, stating its objections, on the trial of which the burden shall be on the plaintiff to show that the rule or regulation is unjust and unreasonable, and that the court in which such petition is filed has jurisdiction to determine whether the regulation is unreasonable and unjust.

And in Railroad Commission v. Weld, 96 Tex. 394, 73 S. W. 529 (1903), it was held that under Rev. St. 1895, art. 4565, authorizing an action against the Railroad Commission by a party dissatisfied with a rate made by it, in which such party must show that the rate is unreasonable and unjust to him, the inquiry is not limited to whether the rate is so unreasonable and unjust as to amount to the taking of property without due process of law.

§ 1295. Virginia.

From an action of the Commission prescribing rates, charges or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as provided for in sub-section *e* of this section, an appeal (subject to such reasonable limitations as to time, regulations as to procedure, and provisions as to costs, as may be prescribed by law) may be taken by the corporation whose rates, charges, classifications of traffic, schedule, facilities, conveniences or service, are affected, or by any person deeming himself aggrieved by such action, or (if allowed by law) by the Commonwealth. Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court of

Appeals from the inferior courts, except that such an appeal shall be of right, and the Supreme Court of Appeals may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the corporation whose rates, charges or classifications of traffic, schedules, facilities, conveniences or service are affected, the Commonwealth shall be made the appellee; but, in the other cases mentioned, the corporation so affected shall be made the appellee. The general assembly may also, by general laws, provide for appeals from any other action of the commission, by the Commonwealth or by any person interested, irrespective of the amount involved. All appeals from the Commission shall be to the Supreme Court of Appeals only; and in all appeals to which the Commonwealth is a party, it shall be represented by the attorney-general or his legally appointed representative. No court of this Commonwealth (except the Supreme Court of Appeals, by way of appeals as herein authorized), shall have jurisdiction to review, reverse, correct or annul any action of the Commission within the scope of its authority or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties: *Provided, however,* That the writs of Mandamus and prohibition shall lie from the Supreme Court of Appeals to the Commission in all cases where such writs, respectively, would lie to any inferior tribunal or officer.

Upon the granting of an appeal, a writ of *supersedeas* may be awarded by the appellate court, suspending the operation of the action appealed from until the final disposition of the appeal; but, prior to the final reversal thereof by the appellate court, no action of the Commission prescribing or affecting the rates, charges, or classifications of traffic of any transportation or transmission company shall be delayed, or suspended, in its operation, by reason of any appeal by such corporation, or by reason of any proceedings resulting from such appeal, until a suspending bond shall first have been executed and filed with,

and approved by, the Commission (or approved on review by the Supreme Court of Appeals), payable to the Commonwealth, and sufficient in amount and security to insure the prompt refunding by the appealing corporation to the parties entitled thereto of all charges which such company may collect or receive, pending the appeal, in excess of those fixed, or authorized, by the final decision of the court on appeal. [Constitution (1904), art. 12, section 156.]

§ 1296. **Washington.**

Any railroad or express company affected by the order of the commission and deeming it to be contrary to the law, may institute proceedings in the superior court of the State of Washington in the county in which the hearing before the commission upon the complaint had been held, and have such order reviewed and its reasonableness and lawfulness inquired into and determined. [Laws of 1905, chap. 81, section 3.]

§ 1297. **Wisconsin.**

Any railroad or other party in interest being dissatisfied with any order of the Commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or service, may commence an action in the Circuit Court against the Commission, as defendant, to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order, is unlawful, or that any such regulation, practice or service, fixed in such order, is unreasonable, in which action the complaint shall be served with the summons. If, upon the trial of such action, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall

stay further proceedings in said action for fifteen days from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classification, joint rate or rates, regulation, practice or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence. [Laws of 1905, ch. 362, section 16.]

§ 1298. **Conclusion.**

In general it may be said that the tendency in this legislation is to give the right of access to the courts only under strict limitations. There are various specific points which the legislators have had in mind during recent years; the tendency has been to circumscribe the various possibilities of the situation, to the end that the process shall be effectual; moreover, it is meant that the railroads shall gain nothing by delay, the provision that they shall file bond being common. But from a broader point of view what is most significant is the ideas held as to the proper relations between the commissioners and the courts. Current opinion as expressed in these statutes plainly is that the decision of the commission shall be given every presumption, the conception being that the decision rests with them in the first instance and that the attitude of the courts should be that there is a reviewing authority to prevent plain injustice.

PART II.

Validity of Statutes.

CHAPTER XLII.

STATUTORY REGULATION OF RATES AND THE CONSTITUTION.

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TOPIC A—NATURE OF THE POWER TO FIX RATES.

§ 1301. Regulation of rates by the State.

The basis of the right of the State to regulate the rates of public-service companies is the principle first clearly apprehended and expressed by Lord Hale in his treatise *De Portibus*

Maris,[1] that when property is affected with a public interest it ceases to be *juris privati* only. "Property," as Mr. Chief Justice Waite has said, "does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."[2] And again, "Common carriers exercise a sort of public office, and have duties to perform in which the public are interested. Their business is therefore 'affected with a public interest.'"[3]

§ 1302. **Power to pass on reasonableness of rates.**

The simplest form in which the power to regulate rates can be exercised is that adopted by the common law, that is, the action of the courts, declaring a rate exacted by a carrier unreasonable upon suit of the party who has been called upon to pay it. Such power has been exercised by the courts of common law from the beginning of their history.[4] It has always been recognized that if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter, and to award to the shipper any amount exacted from him in excess of a reasonable rate.[5] This power, which has aptly been called a visitorial power of the State,[6] is only one example of the general power of the State to oversee the acts of those who are en-

[1] Cited in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, B. & W. 71 (1876).

[2] Munn v. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77, B. & W. 71 (1876).

[3] See, generally, Chapter II, *supra*.

[4] Waite, C. J., in Railroad Commission Cases, 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334 (1886).

[5] Brewer, J., in Reegan v. Farmers' L. & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1893).

[6] Williams, J., in Brymer v. Butler Water Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, B. & W. 330 (1897).

gaged in its public service, and to make sure that they really serve the public interests; and this power has been fully discussed in the earlier portions of this treatise.

§ 1303. Power to fix rates.

The power of the State over public service employments is not limited to its power to pass on the reasonableness of rates after they have been established; the power to initiate action, to fix rates in the first instance by way of regulating action, is fully recognized at common law and by the general practice of all common-law countries.[7] In the middle ages, charges were fixed, if at all, by local bodies. Perhaps the earliest regulation of the rates of carriage by fixing the maximum rates specifically by statute occurred in England in 1692.[8] Since that time the right to fix charges by the State seems never to have been questioned, though lawyers have sometimes differed as to the legality of some particular method of fixing the charges.

§ 1304. Power to fix rates not a judicial power.

The earliest action of the State in dealing with rates was doubtless the action of the courts in passing upon the reasonableness of rates fixed by the carrier, and in Munn v. Illinois[9] it was insisted that the power over rates was a judicial power, and could not be exercised by the legislature. But the Court held otherwise. The line of argument was as follows: In common-law countries this power has been exercised from time immemorial by the legislature, which has fixed a maximum beyond which charges are unreasonable. Granting the power to regulate at all, the power to fix rates follows, since that is one means of regulation. The power of the common law to affect rates by providing that they must be reasonable is admitted; but this is

7 See, generally, Chapter XXVI, *supra*.
8 3 W. & M. c. 12, § 24.
9 94 U. S. 113, 133, 24 L. Ed. 77, B. & W. 71 (1876).

itself a regulation. If, then, rates are and always have been regulated by law, that law, like any other, may be changed by the legislature, since no one has a vested interest in any rule of the common law. A legislative regulation of rates is therefore a mere instance of a change in the common law, which it is entirely within the power of the legislature to make; and in doing so it is not exercising judicial functions. This view of the question has been universally followed,[10]

The distinction between legislative and judicial functions is a vital one, and cannot be altered either by legislative act or by judicial decree.[11] Legislation prescribes rules for the future; litigation determines rights and wrongs for the past. To prescribe a tariff of rates for the future is therefore not a judicial act; to determine whether existing or prescribed rates and charges are unreasonable, on the other hand, is a judicial act.[12]

§ 1305. Power to fix rates not strictly legislative.

But while the power to fix rates may be exercised directly by the legislature, it is not, strictly speaking, a legislative power; but rather a so-called administrative function.

Mr. Justice Brewer in the Circuit Court, in Chicago & N. W. Ry. v. Dey,[13] used on this point language which has often been quoted: "While, in a general sense, following the language of the Supreme Court, it must be conceded that the power to fix rates is legislative, yet the line of demarkation between legisla-

[10] Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. R., 167 U. S. 499, 42 L. Ed. 243, 17 Sup. Ct. 896 (1897); Louisville & N. R. R. v. Brown, 123 Fed. 946 (1903); State v. Wilson, 121 N. C. 472, 28 S. E. 553 (1897).

[11] Western Union Tel. Co. v. Myatt, 98 Fed. 335 (1899).

[12] Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1894); Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898); Wheeler v. No. Col. Irr. Co., 10 Colo. 582, 17 Pac. 487 (1888); Brush E. I. Co. v. Consolidated T. & E. Co., 15 N. Y. Supp. 811 (1891).

[13] 35 Fed. 866, 874 (1888).

tive and administrative functions is not always easily discerned. The one runs into the other. The law books are full of statutes unquestionably valid, in which the legislature has been content to simply establish rules and principles, leaving execution and details to other officers. Here it has declared that rates shall be reasonable and just, and committed what is, partially at least, the mere administration of that law to the railroad commissioners. Suppose, instead of a general declaration that rates should be reasonable and just, it had ordered that the rates should be so fixed as to secure to the carrier above the cost of carriage 3 per cent. upon the money invested in the means of transportation, and then committed to the board of railroad commissioners the fixing of a schedule to carry this rule into effect, would not the functions thus vested in such a board be strictly administrative? While, of course, the cases are not exactly parallel, yet the illustration suggests how closely administrative functions press upon legislative power, and enforce the conviction that that which partakes so largely of mere administration should not hastily be declared an unconstitutional delegation of legislative power."

The difficulty felt in this passage in distinguishing legislative and administrative functions is a real one; but it is usually not necessary to make a sharp distinction, and for the present it is enough to point out that the function, while not judicial, is not in the strict sense legislative.[14]

§ 1306. Power to fix rates executive or administrative.

Where it is necessary to find a place for the rate-fixing power in one of the three departments into which government is commonly divided, it undoubtedly forms part of the executive department. We have seen that the power is neither judicial nor legislative; it does not involve the power to make laws, or to

[14] Western Union Tel. Co. v. Myatt, 98 Fed. 335 (1899).

interpret and apply them, but to aid in carrying the laws into effect.[15]

TOPIC B—METHOD OF EXERCISING THE POWER TO FIX RATES.

§ 1307. Fixing rates by statute.

In the United States, where the division of powers is strictly enforced, it is well settled that the legislature has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract or other in the charter of the railroad.[1]

[15] In re Railroad Comrs., 15 Neb. 679, 50 N. W. 276 (1883); Nebraska Tel. Co. v. Cornell, 59 Neb. 737, 82 N. W. 1 (1900).

[1] UNITED STATES:

Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77 (1876), affirming Munn v. Peo., 69 Ill. 80; Chicago, B. & Q. R. R. v. Iowa, 94 U. S. 155, 24 L. Ed. 94 (1876); Peik v. Chicago & N. W. Ry., 94 U. S. 164, 24 L. Ed. 97 (1876); Winona & S. P. R. R. v. Blake, 94 U. S. 180, 24 L. Ed. 98 (1876); Ruggles v. Illinois, 108 U. S. 526, 531, 27 L. Ed. 812, 2 Sup. Ct. 832 (1883), affirming Ruggles v. Peo., 91 Ill. 256; Railroad Commission Cases, 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334 (1886); Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028 (1888); Chicago, M. & S. P. Ry. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462 (1889); Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892), affirming s. c. 83 Mich. 592, 47 N. W. 489; Budd v. New York, 143 U. S. 517, 36 L. Ed. 384, 12 Sup. Ct. 468 (1892), affirming People v. Budd, 117 N. Y. 1, 22 N. E. 670, B. & W. 79; Chesapeake & P. Tel. Co. v. Manning, 186 U. S. 238, 46 L. Ed. 1144, 22 Sup. Ct. 881 (1902).

FEDERAL COURTS:

Atlantic & P. Co. v. United States, 76 Fed. 186 (1896).

STATE COURTS:

Arkansas—Missouri Pac. Ry. v. Smith, 60 Ark. 221, 29 S. W. 752 (1895).

Indiana—Hockett v. State, 105 Ind. 250, 5 N. E. 178 (1885).

Massachusetts—Sawyer v. Davis, 136 Mass. 239 (1884).

Michigan—Pingree v. Michigan Cent. R. R., 118 Mich. 323, 76 N. W. 635 (1898).

§ 1308. **Legislation must be general.**

In Lake Shore & Michigan Southern Railway v. Smith,[2] the court considered the constitutionality of a statute which compelled the railroad to sell 1,000-mile tickets at a reduced rate. The majority of the court held that the legislature having already adopted a schedule of maximum rates it could not make statutory exceptions. Mr. Justice Peckham said: "We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases, and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates, which the company can in no case violate. The legislature, having established such maximum as a general law, now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination—an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates; a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the tickets purchased shall be valid, and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come

[2] 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. 565 (1899).

within the provisions of the statute; and to that extent it would seem that the statute takes the property of the company without due process of law."

To make it clear that this language applied only to the case of an attempted statutory exception to the general schedule of charges, the learned judge added: "We speak of the general right of the company to conduct and manage its own affairs; but, at the same time, it is to be understood that the company is subject to the unquestioned jurisdiction of the legislature in the exercise of its power to provide for the safety, the health, and the convenience of the public, and to prevent improper exactions or extortionate charges from being made by the company."

§ 1309. **Fixing rates by subordinate body.**

It is much more convenient for the legislature to confer on a subordinate administrative body the power to fix rates than to do so itself. This has been done in England by placing the power in the Board of Trade, one of the executive or rather administrative departments of the government. In this country, the power has, in the last quarter century, not infrequently been referred to an administrative commission. The reason for delegating the power of fixing rates in detail to a commission has never been better expressed than by Mr. Justice Brewer:[3] "The reasonableness of a rate changes with the changed condition of circumstances. That which would be fair and reasonable to-day, six months or a year hence may be either too high or too low. The legislature convenes only at stated periods; in this State once in two years. Justice will be more likely done if this power of fixing rates is vested in a body of continual session than if left with one meeting only at stated and long intervals. Such a power can change rates at any time, and thus meet the changing conditions of circumstances. While,

[3] Chicago & N. W. Ry. v. Dey, 35 Fed. 866, 875 (1888).

of course, the argument from inconvenience cannot be pushed too far, yet it is certainly a matter of inquiry whether in the increasing complexity of our civilization, our social and business relations, the power of the legislature to give increased extent to administrative functions must not be recognized."

§ 1310. **Fixing rates by municipal or other local government.**

The legislature may by statute confer the power of fixing rates upon counties, cities, or villages, or any such bodies as constitute local governments; and the power so conferred may be exercised by the body named in accordance with the terms of the statute.[4]

[4] *United States*—Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. Ed. 679, 21 Sup. Ct. 493 (1901); San Diego, L. & T. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571 (1903); Capital City Gaslight Co. v. Des Moines, 72 Fed. 818, 829 (1896); Cleveland City Ry. v. Cleveland, 94 Fed. 385 (1899).

Alabama—Crosby v. City Council, 108 Ala. 498, 18 So. 723 (1895).

California—San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 62 Am. St. Rep. 261, 38 L. R. A. 460 (1897); Redlands L. & C. D. Water Co. v. Redlands, 121 Cal. 363, 53 Pac. 843 (1898).

Florida—Tampa v. Tampa Waterworks Co., (Fla.) 34 So. 631 (1903).

Illinois—Chicago, P. & P. Co. v. Chicago, 88 Ill. 225, 30 Am. Rep. 545 (1878); Water Co. v. Fergus, 178 Ill. 571, 53 N. E. 363, 69 Am. St. Rep. 315 (1899); Danville v. Danville Water Co., 180 Ill. 235, 54 N. E. 224, 69 Am. St. Rep. 304 (1899); Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 65 N. E. 451 (1902).

Iowa—Des Moines v. Des Moines Waterworks Co., 95 Ia. 348, 64 N. W. 269 (1895); Cedar Rapids Water Co. v. Cedar Rapids, 118 Ia. 234, 91 N. W. 1081 (1902).

Maryland—Charles Simon's Sons Co. v. Maryland T. & T. Co., 99 Md. 141, 57 Atl. 193 (1904).

Missouri—State v. Laclede Gas Light Co., 102 Mo. 472, 14 S. W. 974 (1890).

Tennessee—Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075 (1901).

The power is derived solely from the statute; and in the absence of such authority there is no power inherent in a municipal corporation to regulate the rates of public service companies. Nor is the power involved in the police power, the licensing power, or the general power to "regulate" corporations using the streets.[5] If, however, the right to fix rates by ordinance is granted to the city it will be construed as a permanent power, not exhausted by a single act of fixing rates, but capable of being exercised by revising the rates after they have been once fixed.[6]

§ 1311. Fixing rates by inferior courts.

In a State where the division of powers is not strictly insisted upon in the constitution, the power to fix rates may be conferred upon an inferior court, as in Kentucky upon the county court, with appeal to the superior courts in regular series.[7]

§ 1312. Fixing rates by administrative commissions.

The commonest way at present of fixing rates is to commit it to an administrative commission; and this may be legally done.[8]

[5] Old Colony Trust Co. v. Atlanta, 83 Fed. 39 (1897).

[6] Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. Ed. 679, 21 Sup. Ct. 493 (1901).

[7] Troutman v. Smith, 105 Ky. 231, 48 S. W. 1084 (1899).

[8] *United States*—Railroad Commission Cases, 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334 (1886); Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1894); Trammell v. Dinsmore, 183 U. S. 115, 46 L. Ed. 111, 22 Sup. Ct. 46 (1901); Tilley v. Savannah, F. & M. R. R., 5 Fed. 641, 4 Woods, 427 (1881); Chicago & N. W. Ry. v. Dey, 35 Fed. 866 (1888); Chicago, M. & S. P. Ry. v. Tompkins, 90 Fed. 363 (1898); Metropolitan Trust Co. v. Houston & T. C. R. R., 90 Fed. 683 (1898).

Florida—McWhorter v. Pensacola & A. R. R., 24 Fla. 417, 5 So. 129, 12 Am. St. Rep. 220, 2 L. R. A. 504 (1888); Storrs v. Pensacola & A. R. R., 29 Fla. 617, 11 So. 226 (1892).

Georgia—Georgia R. R. & B. Co. v. Smith, 70 Ga. 694 (1883).

§ 1313. **Duty of the courts to pass on reasonableness of rates.**

To whatever body the power of fixing rates may be confided, it is the function of the regular courts to pass upon the reasonableness of the rates thus established; and the courts cannot be deprived of this power. The question of reasonableness cannot be so conclusively determined by the legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.[9]

TOPIC C—CONSTITUTIONALITY OF RATES FIXED BY GOVERNMENT.

SUB-TOPIC 1—GENERAL CONSIDERATIONS.

§ 1314. **Unconstitutional act absolutely void.**

The general doctrine that a statute which is contrary to the constitution is void is well understood; and it applies fully to a statutory regulation of rates. If the statute which fixes or gives power to fix the rate is void, the rate is not in effect, and will be disregarded by the court. It is possible, however, to provide by statute that the rate shall be binding between the parties until declared void by the courts.[1]

Illinois—Chicago, B. & Q. R. R. v. Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141 (1894).

Iowa—Hopper v. Chicago, M. & S. P. Ry., 91 Ia. 639 (1894).

Minnesota—State v. Chicago, M. & S. P. R. R., 38 Minn. 281, 37 N. W. 782 (1888), reversed on another point, Chicago, M. & S. P. R. R. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462; State v. Minneapolis & S. L. R. R., 80 Minn. 191, 83 N. W. 60 (1900).

Nebraska—State v. Fremont & E. M. V. R. R., 22 Neb. 313, 23 Neb. 117.

Texas—Railroad Commission v. Houston & T. C. R. R., 90 Tex. 340, 38 S. W. 750 (1897).

Virginia—Atlantic Coast Line Ry. v. Commonwealth, 102 Va. 599, 46 S. E. 911 (1904).

[9] Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1894); Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898).

[1] Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1894).

§ 1315. **Suit against State official to declare rate void.**

Since the rate named in an unconstitutional statute is void, a suit to restrain a State official from enforcing the rate is not a suit to restrain him in acting under a State law; in short, it is not a suit against a State. A federal court may therefore entertain such a suit.[2] "It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment."[3]

§ 1316. **Function of the courts in declaring rate void.**

It follows that any act of rate-fixing may be attacked in any court in which the question may come up as unconstitutional and therefore void. And in almost every case where such an attack is made, it may be based upon a provision of the constitution of the United States: that against impairing the obligation of contracts, depriving of equal protection of the laws, or taking property without due process of law. A considerable number of cases have therefore been taken to the Supreme Court of the United States and an important body of doctrine has been developed by the decisions, and will be examined at large.[4]

[2] Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1894).

[3] Harlan, J., in Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898).

[4] Constitutional questions as to the right to regulate railroad rates are considered in the following Supreme Court cases, among others: Railroad Commission Cases, 116 U. S. 307, *sub nom.* Stone v. Farmers' Loan & T. Co., 29 L. Ed. 636, 6 Sup. Ct. 334, 388, 1191 (1886); Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028 (1888); Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. Ed. 377, 9 Sup. Ct. 47 (1888); Chicago, M. & St. P. Ry. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462, 702 (1889); Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892); Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1894); St. Louis & S. F. R. R. v. Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484 (1895); Covington & L. Turnp. Road Co.

§ 1317. Rate constitutional as to one railroad, not as to another.

If a general law is passed, fixing rates for all railroads, and it appears that the prescribed rates permit one company to do business at a profit, but another whose facilities are inferior or whose expenditures are greater cannot do business at a profit, is the whole law valid or invalid? Or is it invalid as to one road but not as to another? This question was raised but not decided by Mr. Justice Shiras in St. Louis & San Francisco Railway v. Gill.[5] The question, however, is not a very difficult one. A general act may be inapplicable to a particular case because of some peculiarity of the case, without thereby becoming void as to all cases. If the illegality of the act is inherent in the act itself it will of course be absolutely void; but if it results from its application to a certain case, it may be entirely legal when applied to the ordinary case. So an act fixing rates of fare for all railroads in a State might not be applicable to one particular road, because of some contract exempting the road from its operation, or because that particular road, unlike the other roads in the State, would by the operation of the act be unable to pay its expenses. If thereafter the contract came to an end or the road became prosperous, the act would apply to the road as it had previously applied to other roads.[6]

§ 1318. Statute constitutional in part.

As a statute may be inapplicable to one railroad without impairing its general validity, so it may be unconstitutional in one of its provisions without invalidating the rest. The effect of a single unconstitutional provision in a statute was discussed

v. Sandford, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. 198 (1896); Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898); Chicago, M. & S. P. Ry. v. Smith, 176 U. S. 167, 44 L. Ed. 418, 20 Sup. Ct. 326 (1900); Cleveland v. Cleveland City Ry., 194 U. S. 517, 48 L. Ed. 1102, 24 Sup. Ct. 756 (1904).

[5] 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484 (1895).

[6] Nebraska Tel. Co. v. Cornell, 59 Neb. 737, 82 N. W. 1 (1900).

in Reagan v. Farmers' Loan & Trust Company.[7] A railroad commission was created with power to make rates reviewable in the courts, but the act contained provisions, assumed for the purpose of the discussion to be unconstitutional, making the rates named conclusive *inter partes,* and imposing excessive penalties. The court held that these provisions could be disregarded without avoiding the entire act. Mr. Justice Brewer said: "It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out, if that which is left is fully operative as a law, unless it is evident, from a consideration of all the sections, that the legislature would not have enacted that which is within, independently of that beyond, its power. Applying this rule, and the invalidity of these two provisions may be conceded without impairing the force of the rest of the act. The creation of a Commission, with power to establish rules for the operation of railroads, and to regulate rates, was the prime object of the legislation. This is fully accomplished, whether any penalties are imposed for a violation of the rules prescribed, or whether the rates shall be conclusive, or simply *prima facie,* evidence of what is just and reasonable. The matters of penalty, and the effect, as evidence, of the rates, are wholly independent of the rest of the statute."

SUB-TOPIC 2—SEPARATION OF GOVERNMENTAL POWER.

§ 1319. Delegation of rate-making power.

It has already been seen that the rate-making power may be delegated to a subordinate body, whether municipal corporation or commission; and this is not unconstitutional as a delegation of legislative power. The legislative act of requiring the rates to be reasonable is either the act of the common law or is part of the act by which the delegation of authority is conferred. The

[7] 154 U. S. 362, 38 L. Ed. 1014, 16 Sup. Ct. 1047 (1894).

functions of such bodies in determining and fixing reasonable rates are administrative rather than legislative. The authority conferred on them relates merely to the administration in practice of the general rules laid down by the common law and by the legislature. So in the Railroad Commission Cases [1] the legality of the action of the Mississippi Legislature in creating a railroad commission with power to fix rates was involved. The rate so fixed could be enforced in the courts, unless the courts should find it unjust. The delegation of the rate fixing power to a commission in this way was held to be constitutional. On this question, Mr. Justice Brewer said in Chicago & Northwestern Railway v. Dey:[2] "There is no inherent vice in such a delegation of power; nothing in the nature of things which would prevent the State by constitutional enactment, at least, from intrusting these powers to such a board; and nothing in such constitutional action which would invade any rights guarantied by the Federal Constitution. So that, after all, the question is one more of form than of substance. The vital question with both shipper and carrier is that the rates shall be just and reasonable, and not by what body they shall be put in force."

§ 1320. **Delegation of power without appeal to the courts.**

In Chicago, Milwaukee & St. Paul Railway v. Minnesota,[3] the court had to pass upon the Minnesota act, which conferred upon the Railroad Commission the power to fix rates without appeal to the courts. In the opinion of the court, this was not "due process of law," and for that reason was obnoxious to the Constitution. Mr. Justice Blatchford's words show clearly that the lack of appeal to the courts on the question whether the rate fixed by the Commission was reasonable was the sole ground on

1 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334 (1886).
2 35 Fed. 866, 874 (1888).
3 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462 (1889).

which the statute was held void. "It conflicts," he says, "with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

§ 1321. Temporary interruption of appeal to the courts.

In Reagan v. Farmers' Loan & Trust Company,[4] it was provided that the rate established by the Commission should be conclusive in actions between private individuals and the companies, so that a rate fixed by the Commission would in fact be binding until declared unreasonable by the courts in a suit specially instituted for the purpose. The court plainly intimated that this was constitutional, but did not find it necessary to decide the question.

§ 1322. Action of the rate-making body as evidence of reasonableness.

It is commonly provided, as in the Interstate Commerce Act, that the rate as fixed by the Commission shall be taken as reasonable until the contrary is shown, or that the action of the Commission shall be *prima facie* evidence of the reasonableness of the rate as found. This is not unconstitutional; the legislature has power over the weight of evidence, and this provision is merely an exercise of that power.[5]

[4] 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1894).

[5] Chicago, B. & Q. R. R. v. Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141 (1894); Burlington, C. R. & M. R. R. v. Dey, 82 Ia. 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436 (1891).

It is sometimes provided that the action of the Commission should be "sufficient evidence of the reasonableness of the rates established by them." In Richmond & Danville Railroad v. Trammel,[6] it was claimed that this meant conclusive evidence and therefore that the action of the Commission in establishing such a rate was unconstitutional. The court, however, held that this meant merely that the action of the Commission constituted *prima facie* evidence of reasonableness which in the absence of evidence to the contrary would be sufficient to justify a verdict to that effect.

§ 1323. Confusion of the powers of government.

An attempt has been made to create a commission which should fix rates, and should also have the powers of a court; which should first fix rates, then judicially declare them reasonable, and so fulfil the requirements of law without loss of time or hazard of strange judges. This attempt was made in Kansas, where the legislature established a Court of Visitation, gave it the ordinary constitution and powers of a court, and conferred upon it the right to issue writs and injunctions, to summon witnesses, and to decide between parties; and also conferred upon it the power to fix railroad rates. This legislation was held unconstitutional, as violating the constitutional separation of powers, since the body was to exercise both legislative and judicial functions.[7] "Concisely stated," said District Judge Hook,[8] "the Court of Visitation may make laws, sit judicially upon their own acts, and then enforce their enactments which have received their judicial sanction. Can this be done? Can there be vested in one body such a union of powers of the different departments or branches of government, to be exercised respecting the same subject-matter and in the same proceeding?"

[6] 53 Fed. 196 (1892).

[7] Western Union Tel. Co. v. Myatt, 98 Fed. 335 (1899); State v. Johnson, 61 Kan. 843, 60 Pac. 1060, 49 L. R. A. 662 (1900).

[8] Western Union Tel. Co. v. Myatt, 98 Fed. 335, 347 (1899).

The fact, however, that the Commission is given not merely the power to fix rates, but also (as is the case with the Interstate Commerce Commission) the power to hear controversies between parties, does not make its organization unconstitutional, provided the power of passing on the validity of its rates is not withdrawn from the ordinary courts.[9] That was in fact the case with the commissions whose acts have been upheld by the Supreme Court of the United States.[10]

SUB-TOPIC 3—OBLIGATION OF CONTRACTS.

§ 1324. Charter of corporation as contract against rate-fixing.

A State may be disabled from fixing the rates of a railroad company by reason of some provision in its charter which constitutes a contract with the State.[1] Such a contract is made by a provision in a charter allowing a certain maximum charge to be made by the railroad; the charter having been accepted, the legislature cannot subsequently reduce the maximum rate.[2] So where the charter provided that rates should not be so reduced that the company should earn less than twelve per cent., this constituted a contract.[3]

9 Louisville & N. R. R. v. Brown, 123 Fed. 946 (1903).

10 See, for instance, the provisions of the Mississippi Act, upheld in Railroad Commission Cases, 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334 (1886). cases cited, the following: Philadelphia, W. & B. R. R. v. Bowers, 4 Houst. Del. 506 (1873); Hamilton v. Keith, 5 Bush (Ky.) 458 (1869); American Coal Co. v. Consolidation Coal Co., 46 Md. 15 (1877); Owen v. St. Louis & S. F. R. R., 83 Mo. 454 (1884); Camden & A. R. R. v. Briggs, 22 N. J. Law 623 (1850); Iron R. R. v. Lawrence Furniture Co., 29 Ohio St. 208 (1876); State v. Southern Pac. Co., 23 Or. 424, 31 Pac. 960 (1893); Attorney-General v. Chicago & N. W. Ry., 35 Wis. 425 (1874).

1 Pingree v. Michigan Cent. R. R., 118 Mich. 314, 76 N. W. 635 (1898).

2 Stone v. Yazoo & Miss. R. R., 62 Miss. 607, 52 Am. Rep. 193 (1883).

3 Ball v. Rutland R. R., 93 Fed. 513 (1899).

§ 1325. **No contract without express provision.**

A charter provision will not be construed as limiting the power of the legislature over rates unless there is an express provision to that effect; the presumption is against such limitation.[4] Thus in Georgia Railroad and Banking Company v. Smith,[5] the charter provided that the charge for transportation should not exceed a certain amount. The court held that this provision did not constitute a contract limiting the power of the legislature to reduce rates. Mr. Justice Field said: "If the charter in this way provides that the charges which the company may make for its service in the transportation of persons and property shall be subject only to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained. But to effect this result, the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the State. There is no such language in the present case."

§ 1326. **Conferring ordinary powers does not create contract.**

The ordinary clauses in railroad charters do not constitute a contract by the State not to regulate rates. Thus no such contract is created either by the grant of power to carry persons and property, or by the power to make by-laws rules and regulations, or by the power to fix, regulate and receive the tolls and charges. This is merely conferring on the corporation the powers that an individual carrier would have, and it leaves the corporation, like the individual carrier, subject to the regulation of the State.[6]

[4] Chicago, M. & S. P. Ry. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462 (1889).

[5] 128 U. S. 174, 32 L. Ed. 377, 9 Sup. Ct. 47 (1888).

[6] Railroad Commission Cases, 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334 (1886).

In Ruggles v. Illinois[7] the point was made that the legislature was restrained by contract from regulating the rates of fare by reason of a provision in the charter of the railroad giving the company the right to make by-laws, provided they were not repugnant to law; and to establish such rates of toll as they should by their by-laws establish. The court held that immunity from legislative control is not to be presumed, and the charter would not constitute a contract exempting the company from the power of the legislature to regulate rates unless it were expressly so provided. In this case, on the other hand, it was provided that the fixing of rates by the company must be by by-law not repugnant to law; and it therefore left the legislature free to act.

In Stanislaus County v. San. Joaquin and King's River Canal and Irrigation Company,[8] the charter gave the company power to fix rates, subject to regulation by a board of supervisors, who, however, were not to reduce the rates below a certain maximum; it was held that this did not prevent the legislature itself from affecting the rates. "There is no promise made in the act that the legislature would not itself subsequently alter that authority."

§ 1327. Contracts made by municipal ordinance.

A contract limiting the power over rates may be made between a city and a public service company. Before holding that such a contract exists, a court must first determine whether the city has power to make such a contract.[9] Such power may be conferred on a city.[10]

[7] 108 U. S. 526, 27 L. Ed. 872, 2 Sup. Ct. 832 (1883).

[8] 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 241 (1903).

[9] Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. Ed. 679, 21 Sup. Ct. 493 (1901).

[10] Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 44 L. Ed. 886, 20 Sup. Ct. 736 (1900). See, also, Walla Walla v. Walla Walla Water Co., 172 U. S. 7, 43 L. Ed. 344, 19 Sup. Ct. 77 (1898).

A city ordinance, accepted by a public service company, which defines the duties of the company and names a maximum rate of compensation, constitutes a contract, and the rate named in such an ordinance cannot thereafter be diminished.[11] There is, however, a constant tendency to find that the ordinance did not constitute a contract and that the power over rates continues.[12]

§ 1328. Charter by Congress.

The grant of a charter by Congress does not remove a railroad from the power of a State to regulate rates within the State.[13] Even though it is expressly provided in the charter that Congress may reduce rates, this does not constitute a contract by implication that the State shall not do so.[14]

§ 1329. Non-user and waiver of the privilege of exemption.

The contractual exemption from regulation of rates may, it would seem, be lost by a company by long-continued non-user (as evidence of rescission of the contract), or by waiver. In San Joaquin and King's River Canal and Irrigation Company v. Stanislaus County,[15] it appeared that by a provision in its charter the company's revenues should not be reduced so as to yield a profit of less than 1 1-2 per cent. a month. This provi-

[11] Detroit v. Detroit Citizens' St. Ry., 184 U. S. 368, 46 L. Ed. 592, 22 Sup. Ct. 410 (1902); Cleveland v. Cleveland City Ry., 194 U. S. 517, 48 L. Ed. 1102, 24 Sup. Ct. 756 (1904), affirming 94 Fed. 385; Crosby v. City Council, 108 Ala. 498, 18 So. 723 (1895); State v. Laclede Gas-Light Co., 102 Mo. 472, 14 S. W. 974 (1890); Columbus v. Columbus Street Ry., 45 Ohio St. 98, 12 N. E. 651 (1886).

[12] Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. Ed. 679, 21 Sup. Ct. 493 (1901); Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. Ed. 702, 21 Sup. Ct. 490 (1901).

[13] Reagan v. Mercantile Trust Co., 154 U. S. 413, 14 Sup. Ct. 1060 (1894).

[14] Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898).

[15] 113 Fed. 930 (1902). On appeal the Supreme Court held that there was no contract. Stanislaus County v. San Joaquin & K. R. C. & I. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. 241 (1903).

sion was made in 1862, and from that time until 1896 the company, fixing its own rates, never realized so much profit. In 1885 a statute was passed which provided that the rates of such companies should not be less than six nor more than eighteen per cent. a year. In 1896 the proper board made rates which yielded revenue less than eighteen per cent. a year. The court held the act legal, on the ground that the company having never for so long a period reduced its nominal right to possession had waived it. "It is perhaps true," Circuit Judge Morrow said, "that there might be cases where a corporation of the character of the complainant, having invested capital in good faith, would not be held to have waived its ultimate right to the limit of income provided in its charter by the acceptance of a smaller income during the progress of construction, or perhaps even longer, until its system of irrigation had brought prospective tracts of land under successful cultivation;" but in this case the long-continued action of the company constituted a waiver.

In Chicago Union Traction Company v. Chicago, [16] the privilege of charging a five-cent fare had been granted to a line leased by the Traction Company. The latter company was formed under a statute which provided that the legislature should have the right to make such regulations as it should deem desirable for carrying on its business. The court held that the privilege granted to the leased line had been waived by its lease to the Traction Company, and that the latter could not exercise it, but was subject to statutory regulation in the matter.

§ 1330. Assignment of privilege of exemption.

The privilege of exemption is ordinarily personal with the grantee, and cannot be assigned in case of sale, lease or consolidation to another company which succeeds to its property

[16] 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631 (1902).

and franchises.[17] So a statute dividing a turnpike company into two distinct corporations, controlling different portions of the road, and providing that each shall retain "all the powers, rights, and capacities" granted by the charter of the original company, does not pass to the new companies a right of exemption from legislative control of tolls which was reserved to the original company by its charter.[18] And so an exemption from State regulation of the price of gas, contained in the charter of a gas company, does not extend to the plants of, and territory occupied by, certain other gas companies, not possessing such immunity in their own right, when absorbed by the former company under the general power of consolidation and merger conferred upon gas companies by an act which provided that the consolidated corporation should be subject to the legal obligations of the companies absorbed.[19]

In Chicago Union Traction Company v. Chicago,[20] the question of violation of a contractual right of the company was involved. The company was lessee of two other street railway; both the latter had a right to charge a five-cent fare for each passenger carried, and this right in each case was alleged to have been assigned to the Traction Company. The court expressed the opinion that the grant of such a privilege is personal to the grantee, and cannot be assigned. The court followed the decision in St. Louis and San Francisco Railway v. Gill,[21] and distinguished the later case of Detroit v. Detroit Citizens' Street Railway[22] on the ground that in that case the question of the assignability of the exemption was not raised.

[17] St. Louis & S. F. Ry. v. Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484 (1895). But see Ball v. Rutland R. R., 93 Fed. 513 (1899).

[18] Covington & L. T. R. Co. v. Sandford, 164 U. S. 596, 41 L. Ed. 566, 17 Sup. Ct. 198 (1896).

[19] People's Gaslight & Coke Co. v. Chicago, 194 U. S. 1, 48 L. Ed. 851, 24 Sup. Ct. 520 (1904).

[20] 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631 (1902).

[21] 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484 (1895).

[22] 184 U. S. 372, 46 L. Ed. 592, 22 Sup. Ct. 412 (1902).

SUB-TOPIC 4—PROTECTION OF PROPERTY.

§ 1331. Unreasonably low rates constitute a taking of property.

When a rate is fixed so low as to impair the earning power of the corporation and render it impossible to obtain a fair return upon its investment, the rate operates a confiscation of the property invested in the business, and is unconstitutional as depriving the company of its property without due process of law. As the rule is generally expressed, an unreasonably low rate is an illegal rate, whether it is fixed by the legislature itself,[1] or by a municipal corporation or board,[2] or by a commission.[3]

§ 1332. The doctrine of the "Granger cases."

The question was first raised for decision in the Supreme Court of the United States in the "Granger Cases," so called.[4]

[1] Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400 (1892); Lake Shore & M. S. Ry. v. Smith, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. 565 (1899); Cotting v. Kansas City S. Y. Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30 (1901); Ball v. Rutland R. R., 93 Fed. 513 (1899); Beardsley v. New York, L. E. & W. R. R., 162 N. Y. 230, 56 N. E. 488 (1900).

[2] San Diego L. & T. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 854 (1899); Cleveland G. & C. Co. v. Cleveland, 71 Fed. 610 (1896); Capital City Gas Co. v. Des Moines, 72 Fed. 818, 829 (1896); New Memphis G. & L. Co. v. Memphis, 72 Fed. 952 (1896); Milwaukee E. R. & L. Co. v. Milwaukee, 87 Fed. 577, B. & W. 336 (1898); Spring Valley W. W. v. San Francisco, 124 Fed. 574 (1903); Palatka Waterworks v. Palatka, 127 Fed. 161 (1903); Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 22 Pac. 910 (1890); San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 62 Am. St. Rep. 261, 38 L. R. A. 460 (1897); Chicago v. Rogers Park Water Co., 214 Ill. 212, 73 N. E. 375 (1905); Des Moines Waterworks v. Des Moines, 95 Ia. 348, 64 N. W. 269 (1895).

[3] Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898); Chicago & N. W. Ry. v. Dey, 35 Fed. 866 (1888); Southern Pac. Co. v. Railroad Comrs., 78 Fed. 236 (1896); Haverhill G. L. Co. v. Barker, 109 Fed. 694 (1901); Wallace v. Arkansas Cent. R. R., 118 Fed. 422, 55 C. C. A. 192 (1902).

[4] Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77 (1876); Chicago, B. & Q.

These were appeals from the State courts of Illinois, Wisconsin, and Minnesota, and from the Federal court in Iowa. In each of these States the legislature had regulated the rates of public service companies; in the first case a grain elevator, in the other cases a railroad. This legislation was attacked as unconstitutional, because a taking of the property without due process of law. The court, however, upheld the acts, on the ground that the property was affected with a public interest, and the rate for the use of it was therefore a subject of legislation. Mr. Chief Justice Waite went very far in supporting the power of the legislature. "We know," he said in Munn v. Illinois, "that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts." Again in Peik v. Chicago & Northwestern Railway he said: "Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." And in Chicago, Milwaukee and St. Paul Railroad v. Ackley the court held that the railroad could charge no more than the maximum so fixed, even if the higher rate were reasonable. "If the company should refuse to carry at the prices fixed, and an attempt should be made to forfeit its charter on that account, other questions might arise, which it will be time enough to consider when they are presented. But for goods actually carried, the limit of the recovery is that prescribed by the statute."

R. R. v. Iowa, 94 U. S. 155, 24 L. Ed. 94 (1876); Peik v. Chicago & N. W. Ry., 94 U. S. 164, 24 L. Ed. 97 (1876); Chicago, M. & St. P. R. R. v. Ackley, 94 U. S. 179, 24 L. Ed. 99 (1876); Winona & St. P. R. R. v. Blake, 94 U. S. 180, 24 L. Ed. 98 (1876); Stone v. Wisconsin, 94 U. S. 181, 24 L. Ed. 99 (1876).

§ 1333. **Early modification of the doctrine.**

There is no doubt of the meaning of the court in these cases. The action of the legislature was deemed binding at least as between private parties, without regard to the reasonableness of the rates. This extreme view was, however, soon abandoned. In Ruggles v. Illinois,[5] Mr. Justice Field in a concurring opinion, expressed the view that no unreasonable rate would be legal; and in Spring Valley Waterworks v. Schottler,[6] Mr. Chief Justice Waite spoke in a most conservative fashion, saying: "What may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable, need not now be considered."

In the Railroad Commission Cases[7] Mr. Chief Justice Waite, however, went further and said, in language which has formed the basis of the rule as it was finally established: "It is not inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a dower to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

The rule was not yet finally settled, however. In Dow v. Beidelman[8] the statute of Arkansas limiting rates of fare on railroads over a hundred miles long to three cents a mile was attacked as unconstitutional. It was shown that the income of the road under that act would not pay the interest on its bonds; but it was not shown what actual expenditure or value the bonds represented. On this ground the court declined to enter upon the general question presented; Mr. Justice Gray saying that

5 108 U. S. 526, 27 L. Ed. 812, 2 Sup. Ct. 832 (1883).
6 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. 48 (1884).
7 116 U. S. 307, 331, 29 L. Ed. 636, 6 Sup. Ct. 334 (1886).
8 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028 (1888).

"the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature is unreasonable. Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law."

§ 1334. The rule finally established.

In Chicago, Milwaukee & St. Paul Railway v. Minnesota[9] the court held for the first time that after a rate is fixed by legislature or commission it is necessarily within the power of the courts to declare the rate illegal if it is unreasonable. "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." That this was regarded as new doctrine at the time of the decision by the judges who had decided the Granger and the Railroad Commission Cases is evident from an examination of the dissenting opinion of Mr. Justice Bradley. The opinion of the majority, he said, "practically overrules Munn v. Illinois," and he reiterated the view that the fixing of rates is for the legislature alone, without interference from the courts. The view of the majority has been accepted, and the present doctrine as to

[9] 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462 (1889).

the power of the courts over rates fixed by legislature or commission dates from this decision.

In Reagan v. Farmers' Loan & Trust Company [10] the court reiterated this doctrine so strongly that it can no longer be regarded as open to question. Mr. Justice Brewer put the whole doctrine clearly and concisely in a single sentence: "The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature, instead of the carrier, prescribes the rates." Later in the same opinion he added: "While it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power, and a part of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property."

In Smyth v. Ames [11] the same doctrine was elaborated, and since the decision of that case the rule has never been questioned. What rates are in fact reasonable has been considered at length in an earlier portion of this work.

§ 1335. Exceptional rates forbidden.

In Lake Shore & Michigan Southern Railway v. Smith,[12] Mr. Justice Peckham said: "If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low, as that term is under-

[10] 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047 (1894).
[11] 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418 (1898).
[12] 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. 565 (1899).

stood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations." The act declared invalid in this decision was an act requiring a railroad to sell mileage books at a reduced rate. The decision was followed in New York;[13] but the statute was held valid as to a corporation organized after the passage of the act, since the corporation became bound by its charter to comply with the act.[14]

TOPIC D — CONSTITUTIONAL POWER OF CONGRESS OVER INTERSTATE RATES.

§ 1336. Power to fix rates appears to be given to the Congress.

The power of Congress either directly or through a commission to fix the rates of carriers in interstate carriage has been recently questioned. It would be extraordinary if such power were not granted by the Constitution. We have seen that the power existed at common law, and was exercised in England before the Revolution, as well as in the States. At the time of the adoption of the Constitution the power was lodged in the States. It is a maxim of constitutional law that all power not

[13] Beardsley v. New York, L. E. & W. R. R., 162 N. Y. 230, 56 N. E. 488 (1900).

[14] Minor v. Erie R. R., 171 N. Y. 566, 64 N. E. 454 (1902).

granted to the United States in the Constitution remains in the States; the Constitution of the United States was a power-conferring, not a power-destroying document. But nothing can be clearer than that the right of fixing rates for interstate commerce is no longer in the States; a fixing of rates by legislation or commission would be a regulation of interstate commerce, which Congress alone has power to regulate. It would seem to follow without possibility of doubt that the power which was taken away from the States by the Constitution, because it was a power to regulate commerce, was at the same time conferred, as such power, on the Congress. But as there has been no express decision to that effect, the question may be regarded as to that extent unsettled.

§ 1337. Power to fix rates is inherent in legislative power to regulate carriage.

Legislative power over carriage, such as is given to the Congress by the Constitution in cases of interstate commerce, carries with it the power to fix rates, either directly or through a commission. "This power of regulation," said Mr. Chief Justice Waite, referring to the fixing of maximum railroad rates, "is a power of government, continuing in its nature." [1] And in the case of Munn v. Illinois, the same Judge said:[2] "The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied."

§ 1338. Congress allowed to fix maximum rates.

Congress, acting under other powers, has fixed rates, and has been sustained in so doing. Thus in Chesapeake and Potomac Telephone Company v. Manning the Supreme Court upheld

[1] Railroad Commission Cases, 116 U. S. 307, 325, 29 L. Ed. 636 (1886).
[2] 94 U. S. 113, 134, 26 L. Ed. 77 (1876).

an act of Congress which fixed telephone rates in the District of Columbia.

§ 1339. Power of Congress to fix rates for interstate commerce has been assumed.

Though the question has never been presented directly to the Court and made the ground of its decision, yet the Supreme Court has in its decisions *obiter* assumed the existence of the power. Thus in Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway (the Maximum Rate Case)[4] Mr. Justice Brewer said: "There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions." "The question debated is whether it vested in the Commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication. Administrative control over railroads through boards or commissions was no new thing." This language appears to recognize as vested in Congress the power which in theory we have found there—the power by itself or its commission to fix railroad rates.

[3] 186 U. S. 238, 46 L. Ed. 1144, 22 Sup. Ct. 881 (1902).
[4] 167 U. S. 479, 494, 17 Sup. Ct. 896 (1897).

APPENDIX.

APPENDIX A.

Rules of Practice Before the Interstate Commerce Commission.

I.

Public Sessions.

The general sessions of the Commission for hearing contested cases will be held at its office in the Sun building, No. 1317 F street, N. W., Washington, D. C., on such days and at such hour as the Commission may designate.

When special sessions are held at other places, such regulations as may be necessary will be made by the Commission.

Sessions for receiving, considering, and acting upon petitions, applications, and other communications, and also for considering and acting upon any business of the Commission other than the hearing of contested cases, will be held at its said office at 11 o'clock a. m. daily when the Commission is in Washington.

II.

Parties to Cases.

Any person, firm, company, corporation, or association, mercantile, agricultural, or manufacturing society, body politic or municipal organization, or the railroad commissioner or commission of any State or Territory, may complain to the Commission by petition, of anything done, or omitted to be done, in violation of the provisions of the act to regulate commerce by any common carrier or carriers subject to the provisions of said act. Where a complaint relates to the rates or practices of a single carrier, no other carrier need be a party, but if it relates to matters in which two or more carriers, engaged in transportation by continuous carriage or shipment, are interested, the several carriers participating in such carriage or shipment are proper parties defendant.

Where a complaint relates to rates or practices of carriers operating different lines, and the object of the proceeding is to secure correction of such rates or practices on each of said lines, all the carriers operating such lines must be made defendants.

When the line of a carrier is operated by a receiver or trustee, both the carrier and its receiver or trustee should be made defendants in cases involving transportation over such line.

Persons or carriers not parties may petition in any proceeding for leave to intervene and be heard therein. Such petition shall set forth the petitioner's interest in the proceeding. Leave granted on such application shall entitle the intervener to appear and be treated as a party to the proceeding, but no person, not a carrier, who intervenes in behalf of the defense, shall have the right to file an answer or otherwise become a party, except to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel on the argument of the case.

III.

Complaints.

Complaints of unlawful acts or practices by any common carrier, made in pursuance of section 13 of the act to regulate commerce, must be by petition, setting forth briefly the facts claimed to constitute a violation of the law. The name of the carrier or carriers complained against must be stated in full, and the address of the petitioner, with the name and address of his attorney or counsel, if any must appear upon the petition. The complainant must furnish as many copies of the petition as there may be parties complained against to be served.

The Commission will cause a copy of the petition, with notice to satisfy or answer the same within a specified time, to be served, personally or by mail in its discretion, upon each carrier complained against.

IV.

Answers.

A carrier complained against must answer within twenty days from the date of the notice above provided for, but the Commission may, in a particular case, require the answer to be filed within a shorter time. The time prescribed in any case may be extended, upon good cause shown, by special order of the Commission. The original answer must be filed with the Secretary of the Commission at its office in Washington, and a copy thereof at the same time served, personally or by mail, upon the complainant, who must forthwith notify the Secretary of its receipt. The answer must specifically admit or deny the material allegations of the petition, and also set forth the facts which will be relied upon to support any such denial. If a carrier complained against shall make satisfaction before answering, a written acknowledgment thereof, showing the character and extent of the satisfaction given, must be filed by the complainant,

and in that case the fact and manner of satisfaction, without other matter, may be set forth in the answer. If satisfaction be made after the filing and service of an answer, such written asknowledgment must also be filed by the complainant, and a supplemental answer setting forth the fact and manner of satisfaction must be filed by the carrier.

V.

NOTICE IN NATURE OF DEMURRER.

A carrier complained against who deems the petition insufficient to show a breach of legal duty, may, instead of answering, or formally demurring, serve on the complainant notice of hearing on the petition; and in such case the facts stated in the petition will be deemed admitted. A copy of the notice must at the same time be filed with the Secretary of the Commission. The filing of an answer, however, will not be deemed an admission of the sufficiency of the petition, but a motion to dismiss for insufficiency may be made at the hearing.

VI.

SERVICE OF PAPERS.

Copies of notices or other papers must be served upon the adverse party or parties, personally or by mail; and when any party has appeared by attorney, service upon such attorney shall be deemed proper service upon the party.

VII.

AFFIDAVITS.

Affidavits to any pleading or application may be made before any officer of the United States, or of any State or Territory, authorized to administer oaths.

VII.

AMENDMENTS.

Upon application of any party, amendments to any petition or answer, in any proceeding or investigation, may be allowed by the Commission in its discretion.

IX.

ADJOURNMENTS AND EXTENSIONS OF TIME.

Adjournments and extensions of time may be granted upon the application of any party in the discretion of the Commission.

X.

Stipulations.

The parties to any proceeding or investigation before the Commission may, by stipulation in writing filed with the Secretary, agree upon the facts, or any portion thereof involved in the controversy, which stipulation shall be regarded and used as evidence on the hearing. It is desired that the facts be thus agreed upon whenever practicable.

XI.

Hearings.

Upon issue being joined by the service of an answer or notice of hearing on the petition, the Commission will assign a time and place for hearing the case, which will be at its office in Washington, unless otherwise ordered. Witnesses will be examined orally before the Commission, unless their testimony be taken or the facts be agreed upon as provided for in these rules. The complainant must in all cases establish the facts alleged to constitute a violation of the law, unless the carrier complained against admits the same or fails to answer the petition. The carrier must also prove facts alleged in the answer, unless admitted by the petitioner, and fully disclose its defense at the hearing.

In case of failure to answer, the Commission will take such proof of the facts as may be deemed proper and reasonable, and make such order thereon as the circumstances of the case appear to require.

Cases shall be argued orally upon submission of the testimony, unless a different time shall be agreed upon by the parties or directed by the Commission, but oral argument may be omitted in the discretion of the Commission.

XII.

Depositions.

The testimony of any witness may be taken by deposition, at the instance of a party, in any proceeding or investigation before the Commission, and at any time after the same is at issue. The Commission may also order testimony to be taken by deposition, in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a District or Circuit Court, or any chancellor, justice, or judge of a Supreme or Superior Court, mayor or chief magistrate of a city, judge of a County Court, or Court of Common Pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, or otherwise interested in the proceedings or investigation. Reasonable

notice must be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, which notice shall state the name of the witness and the time and place of the taking of his deposition, and a copy of such notice shall be filed with the Secretary.

When testimony is to be taken on behalf of a common carrier in any proceeding instituted by the Commission on its own motion, reasonable notice thereof in writing must be given by such carrier to the Commission itself, or to such person as may have been previously designated by the Commission to be served with such notice.

Every person whose deposition is taken shall be cautioned and sworn (or may affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing, which may be typewriting, by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the witness.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Secretary. All depositions must be promptly filed with the Secretary.

XIII.

WITNESSES AND SUBPOENAS.

Subpoenas requiring the attendance of witnesses from any place in the United States to any designated place of hearing, for the purpose of taking the testimony of such witnesses orally before one or more members of the Commission, or by deposition before a magistrate authorized to take the same, will, upon the application of either party, or upon the order of the Commission directing the taking of such testimony, be issued by any member of the Commission.

Subpoenas for the production of books, papers, or documents (unless directed to issue by the Commission upon its own motion) will only be issued upon application in writing; and when it is sought to compel witnesses, not parties to the proceeding, to produce such documentary evidence, the application must be sworn to and must specify, as nearly as may be, the books, papers, or documents desired; that the same are in the possession of the witness or under his control; and also, by facts stated, show that they contain material evidence necessary to the applicant. Applications to compel a party to the proceeding to produce books, papers, or documents need only set forth in a general way the books, papers, or documents desired to be produced, and that the applicant believes they will be of service in the determination of the case.

Witnesses whose testimony is taken orally or by deposition, and the magistrate or other officer taking such depositions, are severally entitled to the same fees as are paid for like services in the courts of the United States, such fees to be paid by the party at whose instance the testimony is taken. [Fees of witnesses are fixed by law at $1.50 for each day's attendance at the place of hearing or of taking depositions, and 5 cents per mile for going to said place from his place of residence and 5 cents per mile for returning therefrom.]

XIV.

PROPOSED FINDINGS AND BRIEFS.

Proposed findings embracing the material facts claimed to be established by the evidence, and referring to the particular part of the record relied upon to support each finding proposed, shall be filed by each party. Printed or written arguments or briefs may be filed by any party. A copy of the proposed findings, brief, or argument filed on behalf of any party, must at the same time be served upon the adverse party or parties, personally or by mail, and notice of such service thereupon filed with the Secretary of the Commission. The time within which proposed findings and printed or written arguments or briefs shall be filed in any case will be determined by the Commission upon submission of the testimony.

XV.

REHEARINGS.

Applications for reopening a case after final submission, or for rehearing after decision made by the Commission, must be by petition, and must state specifically the grounds upon which the application is based. If such application be to reopen the case for further evidence, the nature and purpose of such evidence must be briefly stated, and the same must not be merely cumulative. If the application be for a rehearing, the petition must specify the findings of fact and conclusions of law claimed to be erroneous, with a brief statement of the grounds of error; and when any recommendation, decision, or order of the Commission is sought to be reversed, changed, or modified on account of facts and circumstances arising subsequent to the hearing, or of consequences resulting from compliance with such recommendation, decision, or order which are claimed to justify a reconsideration of the case, the matters relied upon by the applicant must be fully set forth. Such petition must be duly verified, and a copy thereof, with notice of the time and place when the application will be made, must be served upon the adverse party at least ten days before the time named in such notice.

XVI.

Printing of Pleadings, etc.

Pleadings, depositions, briefs, and other papers of importance, shall be printed or in typewriting, and when not printed only one side of the paper shall be used.

XVII.

Copies of Papers or Testimony.

Copies of any petition, complaint, or answer in any matter or proceeding before the Commission, or of any order, decision, or opinion by the Commission, will be furnished without charge, upon application to the Secretary by any person or carrier party to the proceeding.

One copy of the testimony will be furnished by the Commission for the use of the complainant, and one copy for the use of the defendant, without charge; and when two or more complainants or defendants have appeared at the hearing, such complainants or defendants must designate to whom the copy for their use shall be delivered.

XVIII.

Compliance with Orders Against Carriers.

Upon the issuance of an order against any carrier or carriers, after hearing, investigation, and report by the Commission, such carrier or carriers must promptly, upon compliance with its requirements, notify the Secretary that action has been taken in conformity with the order; and when a change in rates is required, such notice must be given in addition to the filing of a schedule or tariff showing such change in rates.

XIX.

Application by Carriers Under Proviso Clause of Fourth Section.

Any common carrier may apply to the Commission, under the proviso clause of the fourth section, for authority to charge for the transportation of like kind of property less for a longer than for a shorter distance over the same line, in the same direction, the shorter being included within the longer distance. Such application shall be by verified petition, which shall specify the places and traffic involved, the rates charged on such traffic for the shorter and longer distances, the carriers other than the petitioner which may be interested in the traffic, the character of the hardship claimed to exist, and the extent of the relief sought by the petitioner. Upon the filing of such a petition, the Commission will take such action as the circumstances of the case seem to require.

XX.

Information to Parties.

The Secretary of the Commission will, upon request, advise any party as to the form of petition, answer, or other paper necessary to be filed in any case, and furnish such information from the files of the Commission as will conduce to a full presentation of facts material to the controversy.

XXI.

Address of the Commission.

All complaints concerning anything done or omitted to be done by any common carrier, and all petitions or answers in any proceeding, or applications in relation thereto, and all letters and telegrams for the Commission, must be addressed to Washington, D. C., unless otherwise specially directed.

APPENDIX B.

Forms in Proceedings Before the Interstate Commerce Commission.

Complaint Against a Single Carrier.

[Official blank form.]

Interstate Commerce Commission.

A. B.
against
The ———— Railroad Company.

The petition of the above-named complainant respectfully shows:

I. That (*here let complainant state his occupation and place of business*).

II. That the defendant above named is a common carrier engaged in the transportation of passengers and property by railroad between points in the State of ————, and points in the State of ————, and as such common carrier is subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

III. That (*here state concisely the matters intended to be complained of. Continue numbering each succeeding paragraph as in Nos. I, II, and III*).

Wherefore the petitioner prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of the act to regulate commerce, and for such other and further order as the Commission may deem necessary in the premises. (*The prayer may be varied so as to ask also for the ascertainment of lawful rates or practices and an order requiring the carrier to conform thereto. If reparation for any wrong or injury be desired, the petitioner should state the nature and extent of the reparation he deems proper.*)

Dated at ————, ———— ——, 190—.

A. B.
(*Complainant's signature.*)

Complaint of Unreasonable Charges.

[Filed with Commission.]

Interstate Commerce Commission.

To the Honorable Interstate Commerce Commissioners:

(I.) Your petitioners complain of the Oregon Railway & Navigation Company and respectfully represent: That on the 13th day of June, A. D. 1887, your petitioners shipped from the City of Colfax, in the Territory of Washington, to the City of Portland, in the State of Oregon, two car loads of wheat, to wit: 122 sacks of wheat of the weight of 20,000 pounds on one car, and 230 sacks of wheat of the weight of 30,000 pounds on the other car. That the said two car loads of wheat were loaded on said cars at your petitioners' sole expense, and were delivered to said Oregon Railway & Navigation Company for transportation to Portland, Oregon, as aforesaid, on said 30th day of June, A. D. 1887. That the distance from the said City of Colfax, in Washington Territory, to Portland, Oregon, does not exceed 320 miles. That the said Oregon Railway & Navigation Company, against the protests of your petitioners, have charged your petitioners for transporting the said two car loads of wheat the said 320 miles, the full sum of $175, or at the rate of $7 for each ton of 2000 pounds.

(II.) Your petitioners further aver that it is stated in the annual report of the said Oregon Railway & Navigation Company for 1886, that the total cost of all property of every description owned by said Company, including ocean steamers, river and sound boats, barges and wharves, is $32,924,433.72; while its net income from railroad earnings alone was, as appears by the same report, $2,256,589.78, or 6 8/10 per cent. on the whole nominal investment of that Company, without counting its earnings from other sources. That during the same year that Company transported over its railroad lines 123,413,669 tons of freight and merchandise, and that the average price it received for transporting merchandise from Portland, Oregon, to Colfax, Washington Territory, was in excess of $30 per ton.

(III.) Your petitioners further allege that the rates recommended by the railroad commissioners of the State of Oregon, for the transportation of wheat from points in the State of Oregon, equi-distant from said Portland, Oregon, with the City of Colfax, in Washington Territory, and reached by the line of the Oregon Railway & Navigation Company, is $4 per ton, or $3 per ton less than the said Company has charged your petitioners.

(IV.) Your petitioners further allege that the said Oregon Railway & Navigation Company has agreed to make a rate from points in Columbia county, Washington Territory, as far from Portland, Oregon, as is the City of Colfax, for the transportation of wheat and other grains over the

line of said railroad to said Portland, Oregon, of $5 per ton, while still continuing the rate from said Colfax at $7 per ton, thus charging your petitioners, and all other handlers of grain in Colfax, $2 per ton more for transporting their wheat the same distance than is charged the wheat raisers and buyers shipping from said points in Columbia county.

(V.) And your petitioners further allege that the sum of $7 per ton for the transportation of wheat as aforesaid from Colfax, Washington Territory, to Portland, Oregon, is unjust and unreasonable; and that a just and reasonable charge for such transportation is $3.50 per ton, which is approximately the rate fixed for a haul of the same distance by the Illinois State law.

(VI.) Wherefore, your petitioners pray that you may direct the said Oregon Railway & Navigation Company to reimburse to your petitioners the sum of $87.50, the sum paid by your petitioners to the said Oregon Railway & Navigation Company for the transportation of said two car loads of wheat to Portland, Oregon, in excess of a just and reasonable freight charge. And your petitoners further pray that the said Oregon Railway & Navigation Company may be required to establish a rate for the transportation of grain from Colfax, Washington Territory, to Portland, Oregon, not in excess of $3.50 per ton.

McCLAINE, WADE & CO.,
By ALFRED COOLIDGE,
Member of Firm.

Complaint of Discrimination.

[Filed with Commission.]

INTERSTATE COMMERCE COMMISSION.

BOSTON & ALBANY R. R. CO.
v.
NATIONAL DESPATCH LINE.

BOSTON, Mass., *May* 21, 1887.

To the Honorable, the Interstate Commerce Commission:

(I.) Respectfully represents the Boston and Albany Railroad Company, a corporation established in the States of Massachusetts and New York, that the Boston and Lowell Railroad Company, a Massachusetts corporation; the Concord Railroad Company, New Hampshire corporation; the Northern Railroad Company, a New Hampshire corporation; the Central Vermont Railroad Company, a Vermont corporation, and the Grand Trunk Railway Company, established by the laws of Canada, have issued schedules of joint rates under the name of the National Despatch Line.

(II.) Under these schedules the rates from Boston to Detroit, Michigan, are: 51-45-35-24-20-18 for the six classes of freight respectively; and to Montreal, Canada, 45-40-30-23-20-18 for the six classes of freight respectively; while at the same time the Boston & Lowell, Concord, Northern, and Central Vermont Railroad Companies, a part of the roads included in the National Despatch Line, have made and maintained rates from Boston to St. Albans, Vermont, a station on the Central Vermont Railroad, a less distance from Boston than either Detroit or Montreal, in the same direction over the same line as follows: 60-50-40-27-24-17 for the six classes of freight respectively.

(III.) The National Despatch Line comes into competition with the Boston and Albany Railroad Company and its connections at Detroit and other western points.

(IV.) The grievance which this Company and its connections have is that the National Despatch Line makes rates to Detroit and other points in the West less than the Boston and Albany Railroad Company and its connections make to the same points; while at the same time a certain combination of roads, including a part of the roads in the National Despatch Line, viz.: The Boston and Lowell, Concord, Northern, and Central Vermont Railroad Companies maintain higher rates to St. Albans and other intermediate points; that is higher rates for the short haul than for the long haul on the same line in the same direction, on the five upper classes of freight; whereas, if the rates to Detroit and other western points were made the same—no higher and no lower—than to any intermediate point on the same line in the same direction, your petitioner would have no reason to complain.

(V.) With this petition and as a part of it, are sent a copy of the tariff of the National Despatch Line, No. 4, dated April 5, 1887, a copy of the affidavit of H. B. Tindall, the original of which is filed as a part of the petition of this petitioner against the Ogdensburgh and Lake Champlain route, and a copy of the Boston and Albany Railroad and New York Central and Hudson River Railroad, joint west bound interstate freight tariff No. 1.

BOSTON & ALBANY RAILROAD COMPANY,
By Arthur Mills,
General Traffic Manager.

Commonwealth of Massachusetts,
Suffolk, *ss.:*
Sworn to before me,
May 27, 1887.
C. E. Stevens,
Justice of the Peace.

Complaint Against Two or More Carriers.

[Official blank form.]

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE ———— RAILROAD COMPANY.
AND
THE ———— RAILROAD COMPANY.

The petition of the above-named complainant respectfully shows:

I. That (*here let complainant state his occupation and place of business*).

II. That the defendants above named are common carriers engaged in the transportation of passengers and property, by continuous carriage or shipment, wholly by railroad (*or partly by railroad and partly by water, as the case may be*), between points in the State of ————, and points in the State of ————, and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

(*Then proceed as in first Form.*)

Complaint of Various Wrongs.

[Filed with Commission.]

INTERSTATE COMMERCE COMMISSION.

PLUMMER, PERRY & CO.
v.
UNION PACIFIC R. CO. *et al.*

To the Honorable Board of Interstate Commerce Commissioners:

(I.) Your petitioners make complaint against the Union Pacific Railway Company, and their western connection, the Southern Pacific Railway Company, and allege the following facts in support of charges made against said Companies, to wit:

(II.) One car of canned goods, No. 32151, Union Pacific, was purchased on board of cars at San Francisco, and shipped from that point September 10, 1887, bill of lading 13347; consignors, A. Lusk & Co.; purchasers and consignees, Plummer, Perry & Co., Lincoln, Nebraska. The shipment was taken to Omaha, Nebraska, instead of being stopped at Valley Station, and charges seventy-five cents per cwt., San Francisco to Omaha, was col-

lected and shown as advanced charges when shipment was rebilled from Omaha to Lincoln, via Valley Station, at fifteen cents per cwt., making the through charges from San Francisco to Lincoln, ninety cents per cwt. These charges were paid under protest, in which it is claimed that the rate, San Francisco to Lincoln, should not exceed seventy-five cents per cwt. For particulars see bill of lading, expense bill and copy of protest, herewith attached.

(III.) It is further stated that said Railway Companies have during this time, and are now taking canned goods in car loads from San Francisco to Omaha, Sioux City, Chicago, and other jobbing points in the West, in competition with Lincoln, at seventy-five cents per cwt. Therefore, based on the above facts as stated, the complainants charge the Union Pacific Railway Company and the Southern Pacific Railway Company with violations of the Interstate Law as follows:

(IV.) Violation of section 1. The charges made for the service rendered are unreasonable and unjust. It is claimed that a just and reasonable rate is seventy-five cents per cwt.

(V.) Violation of section 2. The excessive charges demanded, collected and received, for performing a like and contemporaneous service, in the transportation of a like kind of traffic, under substantially similar conditions and circumstances, is unjust discrimination.

(VI.) Violation of section 3. An undue and unreasonable preference is given to firms and localities, also unreasonable prejudice and disadvantage is imposed in other respects; and greater compensation is charged and collected in the aggregate for the transportation of like kind of property, under substantially similar conditions and circumstances, for a shorter than for a longer haul.

(VII.) Violation of section 6. The Railway Companies shall print, schedules showing the rates, also they shall not charge, collect or receive, greater or less compensation than is specified in said schedules. The rate of ninety cents, as charged, collected and received, is not a published rate.

(VIII.) Violation of section 7. No stoppage or interruption shall be made to prevent continuous carriage from place of shipment to place of destination; and there shall be no intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act. The shipment was taken to Omaha and reshipped to this point, contrary to the wishes of the consignees, thus subjecting the consignment to an unnecessary haul from Valley Station to Omaha and return, delaying the freight to the injury of claimants and exacting additional revenue for the additional and unnecessary service performed.

(IX.) Complainants also state that they have been injured by the continued violations of the law since the act took effect, April 5 last, and that in consequence of said unjust discriminations that have existed and now exist against them, they have been prevented and are now being prevented

from selling goods in competition with firms doing like business in all other localities with which they come in competition.

(X.) Therefore, complainants pray your honorable body will consider all the facts as above set forth, and will cause a copy of its findings with respect thereto to be delivered to said common carriers, together with a notice to cease and desist from said violations of the law, and to make such full reparation to the complainants for the injury which has been done them by said common carriers, as it may deem just.

State of Nebraska,
Lancaster County, *ss.:*

Eli Plummer, being first duly sworn, deposes and says that he is the senior member of the firm of Plummer, Perry & Co., complainants herein, and that the facts as above set forth are true as he verily believes.

(Signed) ELI PLUMMER,
For Plummer, Perry & Co.

Subscribed and sworn to before me this
29th day of September, 1887.
(Signed) C. L. HARWOOD, Notary Public.
(Seal.)

Complaint of Excessive Charges by Wrong Classification.

[Filed with Commission.]

INTERSTATE COMMERCE COMMISSION.

NATIONAL MACHINERY AND WRECKING CO.
v.
PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RY. *et al.*

The petition of the above-named complainant respectfully shows:

(I.) That complainant is a partnership composed of Jacob W. and Milton S. Kohn, in the State of Ohio, having its principal office and place of business in the city of Cleveland, in said State, and is a dealer in boilers, generators, motors and other machines, shipping the same, new and second-hand, between points lying in different States of the United States, particularly in those States lying in Official Classification territory, which is generally described as that territory lying north of the Potomac and Ohio and east of the Mississippi rivers.

(II.) That the above-named defendants are common carriers engaged in the transportation of property by railroad between points in different States of the United States, and largely in said Official Classification territory, and as such common carriers are subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

(III.) That complainant, in the course of its business, ships over defendants' lines of railroad old and second-hand dynamos from points in other States to Cleveland, where they are converted into junk. That in Official Classification No. 26, dated January 2, 1905, adopted by defendants and now enforced upon their lines, dynamos, new or second-hand, boxed or on skids, crated, are classified at first class and take first-class rates over defendants' lines. That by such classification and rating defendants compel complainant to pay on its shipments of old and second-hand dynamos, which are practically worthless, the first-class rate, which is the same as is charged on new and valuable dynamos. That said rating of second-hand dynamos in the same class as new dynamos is unreasonable, unduly discriminatory, and should be changed. That the classification of second-hand or defective dynamos should be the same as that applied to junk in Official Classification, to wit, sixth class, which affords sufficient compensation for the transportation service performed, because such second-hand dynamos have no more value than the metal contained in them.

(IV.) That the wrongful classification and rating above set forth results in unreasonable and unjust transportation charges on complainant's shipments of second-hand dynamos in Official Classification territory, in violation of section one of said Act to Regulate Commerce, and subjects complainant and other shippers of second-hand dynamos, and their traffic, within the Official Classification territory, to unjust discrimination and undue and unreasonable prejudice and disadvantage, in violation of sections two and three of said Act to Regulate Commerce.

(V.) That on or about the 5th day of October, 1905, complainant had shipped to it from Marietta, Georgia, one second-hand dynamo, weighing 6,300 pounds, and costing complainant $85.00, which was delivered by connections to the defendant, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, at Cincinnati, Ohio, and transported thence by said defendant to Columbus, Ohio, thence via the Cleveland, Akron & Columbus Railway Company to Hudson, Ohio, and thence via the Pennsylvania Company to complainant at Cleveland, Ohio. That said shipment was billed out as "one box of scrap iron" and complainant expected it to take the scrap-iron rate of 65 cents per 100 pounds; but before delivery the rate was advanced to the rate on new dynamos of $1.33 per 100 pounds. That complainant was compelled to pay the unjust and unreasonable rate of $1.33 per 100 pounds for the transportation of such shipment, aggregating the sum of $83.79, instead of the just and reasonable rate of 65 cents per 100 pounds, aggregating the sum of $40.95. That by reason of said unjust classification complainant was compelled to pay an excess charge of $42.84, for which reparation is claimed.

Wherefore, complainant prays that defendants may be required to answer the charges herein; that after due hearing and investigation an order be made requiring the defendants, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, the Cleveland, Akron & Columbus Railway

Company, and the Pennsylvania Company, to pay to complainant the sum of $42.84, or such other sum as, upon the proof to be adduced, the Commission may find complainant entitled to; and requiring all the defendants herein mentioned to wholly cease and desist from the aforesaid violation of said Act to Regulate Commerce; and that such other and further order or orders may be entered as the Commission may deem necessary in the premises and complainant's cause may appear to require.

Dated at Cleveland, Ohio, , 1905.

NATIONAL MACHINERY AND WRECKING COMPANY,

By.....

Secretary.

Notice to Answer.

THE INTERSTATE COMMERCE COMMISSION,

WASHINGTON, D. C., ..., 188 .

To the ....,

....:

Enclosed please find a copy of a ..... petition filed against your company, embracing a statement of charges made by ..... under section 13 of the Act to Regulate Commerce, approved February 4, 1887, and amended March 2, 1889.

You are hereby called upon to satisfy the complaint or to answer the same, in writing, within twenty days from this date.

For the Commission:

.....

Secretary.

General Order Upon Filing of Informal Complaint.

INTERSTATE COMMERCE COMMISSION.

MATTER OF ALLEGED DISCRIMINATION AGAINST THE ENTERPRISE TRANSPORTATION COMPANY.

Complaint having been lodged with the Commission that railroad lines leading westward from New York city unlawfully discriminate by making through charges and joint rates on passenger and freight traffic between points in New England and points on said railroad lines in New York, Pennsylvania and other States, with and in favor of the New England Navigation Company, and refusing to accord similar through charges and joint rates on passenger and freight traffic passing over the line of the Enterprise Transportation Company, which operates a line of vessels between New York city and New England points,

It is ordered: That a proceeding of inquiry and investigation into and concerning said complaint of unlawful discrimination be and is

hereby instituted, and that the New York Central & Hudson River Railroad Company, the Pennsylvania Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, and the Lehigh Valley Railroad Company be, and they severally are hereby, made respondents in said proceedings; and

It is further ordered: That this matter be set down for hearing at United States Court Rooms in the city of New York on the 5th day of March, 1906, at ten o'clock of that day; and that said complainant, the Enterprise Transportation Company, and said respondents, are severally hereby required to appear before the Commission at said time and place, then and there prepared to make full and complete disclosures concerning the matters and things involved herein.

Demurrer.

[Filed with Commission.]

INTERSTATE COMMERCE COMMISSION.

ROBERT M. TUTTLE

v.

NORTHERN PACIFIC R. R. CO.

Defendant demurs to the petition of the complainant and for ground of demurrer assigns: that said petition does not state facts constituting a violation of the Interstate Commerce Law.

Notice by Carrier Under Rule V.

[Official blank form.]

INTERSTATE COMMERCE COMMISSION.

A. B.

v.

THE ..... RAILROAD COMPANY.

Notice is hereby given under Rule V of the Rules of Practice in proceedings before the Commission that a hearing is desired in this proceeding upon the facts as stated in the complaint.

THE ..... RAILROAD COMPANY.

By E. F.,

(*Title of officer.*)

Motion to Dismiss.

[Filed with Commission.]

HOLBROOK

v.

ST. PAUL, MINNEAPOLIS & MANITOBA RY. CO.

Comes the defendant, the said St. Paul, Minneapolis & Manitoba Railway Company, by S. S. Burdett, its attorney, and moves the Commission to dismiss the cause and complaint herein for insufficiency.

1. Because there is no matter set out therein cognizable by this Commission under the act of Congress approved February 4, 1887.

2. Because the said petition or complaint shows on its face that the matters and things therein complained of happened prior to the approval of the act aforesaid and prior to its taking effect as a law.

3. Because said complaint contains no allegation or averment that the matters therein complained of continued after the passage of said act.

4. Because the allegation in said complaint of a belief as to what may happen in the future to the detriment of the petitioners is not ground for interposition in that behalf by the honorable Commission.

S. S. BURDETT,
Attorney for St. Paul, Minneapolis & Manitoba Railway Co.

Answer.

[Official blank form.]

INTERSTATE COMMERCE COMMISSION.

A. B.

v.

THE ..... RAILROAD COMPANY.

The above named defendants, for answer to the complaint in this proceeding, respectfully states:

(I.) That (here follow the usual admissions, denials and averments. Continue numbering each succeeding paragraph.)

Wherefore the defendant prays that the complaint in this proceeding be dismissed.

THE ..... RAILROAD COMPANY.
By E. F.,
(*Title of officer.*)

Answer on the Merits.

[Filed with Commission.]

Interstate Commerce Commission.

The Pennsylvania Railroad Company, for answer to the said petition, or so much thereof as it is advised it is necessary for it to make answer unto, saith:

First. That it admits that a through route between the various companies respondent exists, substantially as alleged in said petition, and that the rate of charges for lumber from the points indicated in said petition, that is to say, from Macon and Atlanta in the State of Georgia, and from Johnson City, in the State of Tennessee, to Boston, are, as per their tariffs filed, the same as set out in the said petition.

Second. That whether the petitioners have a large amount of money invested in business in Johnson City, which they cannot withdraw without severe loss, is a fact as to which this respondent cannot be advised, and asks that the petitioners be held to proof thereof. This respondent, however, denies that the rate which the tariff describes for lumber on said through line from Johnson City to Boston is unjust or unreasonable, or that it greatly injures or unjustly restricts the business of the petitioners.

Third. That the rates from Macon of thirty-six cents and from Atlanta of thirty-four cents per 100 lbs. upon lumber, as well as the rate of thirty-six cents per 100 lbs. from Johnson City, were fixed by the East Tennessee, Virginia & Georgia Railway Company, the initial company; and that the reasons justifying the said rates of thirty-six cents and thirty-four cents per 100 pounds respectively from Macon and Atlanta, respectively 1328 miles and 1240 miles from Boston, as compared with the rate of thirty-six cents per 100 lbs. for the shorter distance from Johnson City, in the State of Tennessee, to Boston, are as follows:

(a.) That the rates in the State of Georgia are fixed and controlled by the Railroad Commissioners of that State, that commission fixing the charges for transportation to coast cities from mills in the State of Georgia.

(b.) The fact of water competition from Brunswick, Georgia, on the Atlantic ocean, to Boston and other north Atlantic points; that adding the rate from the mills to Brunswick, as fixed by the Railroad Commissioners of Georgia, to the rate given by the coast line water carriers to Boston, the aggregate is less than the amount charged, as aforesaid, upon the tariffs of the respondents on their through railroad carriage from Macon and Atlanta to Boston.

(c.) A large amount of freight is received at Atlanta and Macon from eastern cities, including Boston, vessels containing which would have to return empty in large part, but for the fact that they can be returned loaded with lumber.

(d.) The reason why the Atlanta charge is the same as that from Macon arises from the fact that the lumber shipped from Atlanta is manufactured at mills a considerable distance from that city, and transported there over local roads before being marketed.

(e.) That the lumber shipped from Johnson City is for the most part poplar lumber, while that which goes from Georgia territory is exclusively Georgia pine; and that the rate per 100 lbs. per mile for hauling poplar, by reason of its greater bulk, should reasonably be greater than that for hauling pine.

As to all of which matters reference is made for fuller details, to the answer of the East Tennessee, Virginia & Georgia Railway Company.

Wherefore this respondent prays that the said petition be dismissed.

THE PENNSYLVANIA RAILROAD COMPANY,
By.....
General Freight Agent.

.....
Asst. General Solicitor.

Answer by a Leased Railroad.

[Filed with Commission.]

INTERSTATE COMMERCE COMMISSION.

BOSTON & ALBANY R. R. Co.
v.
NATIONAL DISPATCH LINE ET AL.

In the matter of the petition of the Boston and Albany Railroad Company against the Boston & Lowell Railroad Corporation and others, dated May 21, 1887.

The Northern Railroad, named in said petition as the Northern Railroad Company, for answer to such petition, says:

First. That its road is now, and has been since the 31st day of May, A. D. 1884, in the possession of and operated by the Boston & Lowell Railroad Corporation under a lease, and that the Northern Railroad during that time has not made and issued, or joined in making or issuing with the other railroad corporations named in said petition, joint rates, as set forth in the petition.

Second. The respondent corporation has not sufficient knowledge to admit or deny the other matters and things named in said petition, but it requires the same to be proved if, and so far as material, for any purpose against it.

NORTHERN RAILROAD,
By....., Atty.

Commonwealth of Massachusetts,
Suffolk, *ss.:*

June 27, 1887.

Then personally appeared J. H. Benton, Jr., and made oath that he is attorney of the Northern Railroad, by which the foregoing answer is made, and that the same is true.
Before me,

.....
Justice of the Peace.

Answer Denying Joint Agreements.

[Filed with Commission.]

The New York and New England Railroad Company, one of the respondents in the above-entitled cause, separately answering such portions of the complainants' petition as it is advised it is important and necessary to make answer unto, says:

That it is not true, as averred in the first paragraph of the said complaint, that the respondent with the other companies named therein form one connecting through line under joint traffiffic arrangements; that the respondent has no contract or contracts or traffic arrangements with the East Tennessee, Virginia & Georgia Railway Company nor the Norfolk & Western Railway Company, nor with the Shenandoah Valley Railroad Company; that it has no contract or contracts or traffic arrangements with the respondents named herein whose railroads are located south of the Cumberland Valley Railroad Company; the lumber received by the respondent from points south of the Cumberland Valley Railroad is rebilled by said Cumberland Valley Railroad Company and again rebilled by the New York, New Haven & Hartford Railroad Company at Harlem river.

It admits that it has carried lumber at the rate of thirty-six cents per 100 lbs. in full car load lots, which it is informed has come from Johnson City, in the State of Tennessee, to Boston as aforesaid; but the respondent denies that it has carried any lumber from Atlanta, Ga., or any other points south of Hagerstown at a rate of thirty-four cents per 100 lbs. from such initial point to Boston; and it denies that it has charged or received any greater compensation in the aggregate for the transportation of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance.

It admits that it has carried lumber over this road which it is informed has come from Macon, in the State of Georgia, to Boston, at a rate of thirty-six cents per 100 lbs., and says that this rate was made by the initial road without consultation with this respondent.

And the respondent, further answering, says the rate of thirty-six cents per 100 lbs. for transportation of lumber from Johnson City to Boston, a distance of 915 miles, which rate of thirty-six cents is less than eight mills per ton per mile, and which is divided among seven railroad companies, for which service this respondent is required to furnish expensive terminal facilities is not in itself an unreasonably high rate, and that said rate should not be reduced.

This respondent denies each and all of the allegations of the petitioners' complaint not hereinbefore admitted or denied.

NEW YORK & NEW ENGLAND R. R. COMPANY,
By .....
Vice-President.

Subpoena.

[Official blank form.]

To ....., ...

You are hereby required to appear before ..... in the matter of a complaint of ..... against ....., as a witness on the part of ..... on the ..... day of ....., 190.., at .... o'clock ... m. at ....., and bring with you then and there .....

Dated ....

(Seal.)

....

Commissioner.

....., ...,

Attorney for .....

(NOTICE.—Witness fees for attendance under this subpoena are to be paid by the party at whose instance the witness is summoned, and every copy of this summons for the witness must contain a copy of this notice.)

Notice of Taking Depositions Under Rule XII.

[Official blank form.]

INTERSTATE COMMERCE COMMISSION.

A. B.
v.
THE ..... RAILROAD COMPANY.

You are hereby notified that G. H. will be examined before C. D.. a ..... (*title of office or magistrate*), at ....., on the ..... day of ....., 190.., at .... o'clock in the .....noon, as a witness for the above-named complainant (*or defendant, as the case may be*), according to act of Congress in such case made and provided, and the rules of practice of the Interstate Commerce Commission; at which time and place you are notified to be present and take part in the examination of the said witness.

Dated ...., 190...

I. J.

(*Signature of complainant or defendant, or of counsel.*)

To A. B., the above-named complainant (*or The..... Railroad Company, the above-named defendant; or to K. L., counsel for the above-named complainant or defendant.*)

Motion to Strike Out.

[Filed with Commission.]

INTERSTATE COMMERCE COMMISSION.
HOLBROOK
v.
ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY.

Comes the defendant company and moves the honorable Commission to disregard and strike from the files of this case the certain papers and documents described as follows:

The sworn statement of Nelson L. Derby and others, dated April 18, 1887; filed April 23, 1887.

The sworn statement of Nelson L. Derby and W. M. Holbrook, sworn to July 2, 1887, and filed July .., 1887.

And for cause of motion the defendant says that said papers purport to be and contain evidence in support of the petition or complaint in this case filed.

That the said testimony was taken without notice to defendant, and without opportunity to be present, or to cross examine the witnesses produced.

That the testimony therein contained is irrelevant, immaterial and insufficient.

.....

Atty. for Defendant.

Letter of the Commission.

[Replying to inquiries as to procedure.]

June 15th, 1887.

DEAR SIR.—Yours of June 14 received. The rules of the Commission do not require a replication. It is intended that all its proceedings shall be in the simplest form consistent with a reasonable degree of certainty. Cases are considered as at issue when the answer is filed and copies served. If issues of fact are raised upon the answer by denials, or by allegations of new matter, it is the understanding of the Commission that the case stands for trial upon the questions of fact as well as of law; a day for hearing will be assigned on request of either party; witnesses can then be examined, if necessary, and argument made upon the law as applicable to the facts established by proof. The case can be presented by written or printed arguments if parties prefer to take that course. It is the desire of the Commission that parties agree upon facts relating to questions presented, so far as possible; and for this purpose stipulations in writing may be filed or oral concessions made on the hearing. In case parties cannot agree upon the facts and desire to avoid the expense of bringing witnesses to Washington, depositions for use before the Commission may be taken on notice to the other side, in the manner provided by sections 863 and 864 of the Revised Statutes of the United States. Such depositions when taken should be transmitted to the Secretary of the Commission, who will open and file the same. If the taking of depositions is deemed necessary, it should be entered upon as soon as practicable after the service of the answer.

For the Commission:

Yours truly,

EDW. A. MOSELEY,

Secretary.

APPENDIX C.

Table for the Interstate Commerce Acts.

1. Interstate Commerce Act of Feb. 4, 1887, as Amended.

Section 1. Superseded by § 1, Act of June 29, 1906.
2. Printed in § 941, *supra.*
3. Printed in § 941, *supra.*
4. Printed in § 971, *supra.*
5. Printed in § 991, *supra.*
6. Superseded by § 2, Act of June 29, 1906.
7. Printed in § 991, *supra.*
8. Printed in § 1091, *supra.*
9. Printed in § 1091, *supra.*
10. Printed in § 1091, *supra,* as amended March 2, 1889.
11. Printed in § 1031, *supra.* See § 24.
12. Printed in §§ 1031, 1041, 1091, *supra,* as amended March 2, 1889, and Feb. 10, 1891.
13. Printed in § 1041, *supra.*
14. Superseded by § 3, Act of June 29, 1906.
15. Superseded by § 4, Act of June 29, 1906.
16. Superseded by § 5, Act of June 29, 1906.
16a. Added by § 6, Act of June 29, 1906.
17. Printed in § 1041, *supra,* as amended March 2, 1889.
18. Printed in § 1031, *supra.*
19. Printed in § 1031, *supra.*
20. Superseded by § 7, Act of June 29, 1906.
21. Printed in § 1031, *supra,* as amended March 2, 1889.
22. Printed in § 941, *supra,* as amended March 2, 1889.
23. Printed in § 1091, *supra,* added Act of March 2, 1889.
24. Added by § 8, Act of June 29, 1906.

2. Amendments by Act of Feb. 11, 1893.

(Printed in § 1041, *supra.*)

3. Amendments by Act of Feb. 11, 1903.

Section 1. Printed in § 1091, *supra.*
2. Printed in § 1091, *supra.*

4. Amendments by Act of Feb. 19, 1903.

SECTION 1. Superseded by § 2, Act of June 29, 1906.
2. Printed in § 1091, *supra*.
3. Printed in § 1091, *supra*.
4. Printed in § 1091, *supra*.

5. Amendments by Act of June 29, 1906.

SECTION 1. Printed in §§ 891, 911 and 1041, *supra*.
2. Printed in §§ 941, 991, 1011 and 1091, ***supra***.
3. Printed in § 1041, *supra*.
4. Printed in § 1041, *supra*.
5. Printed in § 1091, *supra*.
6. Printed in § 1041, *supra*.
7. Printed in §§ 991 and 1031, ***supra***.
8. Printed in § 1031, *supra*.
9. Printed in § 1091, *supra*.
10. Printed in § 1091, ***supra***.

APPENDIX D.

Recent Decisions on Rate Regulation, May 1, 1906-May 1, 1907, with References to the Text.

§ 152. Baker v. Boston & M. Ry., 00 N. H. 000, 65 Atl. 386. Duty enforced to furnish adequate facilities for all shippers of milk, regardless of other contract engagements.

§ 153. Denver & R. G. Ry. v. Whall, 00 Colo. 000, 89 Pac. 39. No obligation to haul sleeping cars, so can stipulate with one company for exclusive privilege.

§ 343. Long Branch Comm'n v. Titurn Manor Water Co., 00 N. J. Eq. 000, 62 Atl. 474. In a suit to determine reasonable water rates provision should be made for a fair return upon proper capitalization, if that is possible, while keeping rates at a price fair to the consumer; by fair return is meant a net return over cost of operation and depreciation sufficient to pay the current profit upon the reasonable cost of the plant, which is considered proper capitalization unless the plant is far too extensive for the needs of the present, in which case a *pro rata* amount only is allowed as capitalization.

§ 519. Anniston Mfg. Co. v. Southern Ry., 00 Ala. 000, 40 So. 965. The issue being whether rates were extortionate, charges made for similar goods in different localities is not evidence as to proper rate in the locality in question; nor should evidence as to increase of traffic be admitted upon this issue.

§ 524. Harrison Granite Co. v. Pennsylvania Ry. Co., 00 Mich. 000, 108 N. W. 1081. Charging $700 for the transportation of a granite monument a few hundred miles held outrageous in itself upon all the facts, although special guaranty of prompt forwarding was given.

§ 527. Salt River Valley Canal Co. v. Nelsson, 00 Ariz. 000, 85 Pac. 117. A rate for water for irrigation may be passed upon by the courts, and should not be beyond the worth to the consumer of the service rendered.

§ 540. Phillips v. Grand Trunk Western Ry., 11 I. C. C. Rep. 659. Rates upon wire screen doors and windows east bound need not be the same as west bound, but should not greatly vary from similar differences upon similar commodities; but cost of manufacture to competing shippers should not be taken into account in fixing relative rates.

§ 570. National M. & W. Co. v. Pittsburg, C., C. & St. L. Ry. et al., 11 I. C. C. Rep. 581. It is not unreasonable to put the same rate upon second hand dynamos as upon new ones; but dynamos that are so worn out as to have only the value of scrap should be charged for as junk.

§ 573. Interstate Commerce Commission v. Cincinnati, H. & D. Ry., 146 Fed. 559. Re-classification of laundry soap so as to increase its rate held unjustifiable under the circumstances, no other corresponding changes being made.

§ 623. Farrar v. Southern Ry., 11 I. C. C. Rep. 640. Lumber rates between various southern points examined and held to be unreasonable and discriminatory; but the doctrine that rates should necessarily be in proportion to mileage repudiated again.

§ 629. Weil, Bros. & Co. v. Pennsylvania R. R., 11 I. C. C. Rep. 627. A rate of 62 cents per 100 pounds on wool in grease from Philadelphia, Pa., to Fort Wayne, Ind., held not unreasonable even when the rate east bound from Fort Wayne to Philadelphia was 43 cents per 100 pounds, in view of the different conditions of traffic and the volume of freight.

§ 699. Ferguson Trust Co. v. Michigan Central Ry., 148 Fed. 968. A railroad company may make a separate iceing charge and collect for such refrigeration, providing all its rates are published and are reasonable.

§ 703. St. Louis Hay & Grain Co. v. Southern Ry., 149 Fed. 609. Warehousing charges of four cents per 100 pounds held unreasonable, 100 per cent. more than justifiable; and, moreover, certain practices in connection therewith held discriminatory.

§ 741. American Exp. Co. v. Crawley, 00 Miss. 000, 41 So. 261. Outright discrimination by express companies punishable even when not done out of distinct purpose, with specific intent.

§ 764. Hilton Lumber Co. v. Atlantic Coast Line Co., 00 N. C. 000, 53 S. E. 823. A carrier should not give a lower rate on lumber to a customer who later ships the finished product by its line than it gives to other customers.

§ 784. Interstate Commerce Commission v. Ruchmann, 145 Fed. 236. Special reductions to shippers to promote the use of the cars of a private car line held illegal discrimination.

§ 788. Matter of Railroad-Telegraph Companies, 12 I. C. C. Rep. 10. A railroad may contract to give reduced rate or free transportation over its system for men or materials employed in operating and maintaining a telegraph system along its right of way in exchange for reduced rate or free service in running its railway—but not for such services furnished other systems.

§ 789. United States v. New York C. & H. R. R. R., 146 Fed. 298. Payments of rebates from published rates under the guise of claims against the carrier held punishable under the Interstate Commerce Acts.

§ 803. Dulaney v. United Rys. & E. Co., 00 Md. 000, 65 Atl. 45. Exclusive contracts may be made between railways and express companies.

§ 806. Delaware, L. & W. Co. v. Kutter, 147 Fed. 51. A railroad may enter into an exclusive arrangement with a certain person that he shall have exclusive control of the shipment of milk over its lines.

§ 813. Fort Worth & D. C. Ry. v. State, 00 Tex. 000, 87 S. W. 336. It is not illegal for a railroad to make an exclusive contract with a sleeping car company; nor is it contrary to the prohibitions of an anti-trust law.

§ 892. Central Trust Co. v. Pittsburg S. & W. Ry., 101 N. Y. Supp. 837. The provision forbidding a common carrier to transport from State to State after May 1, 1908, any article mined or produced by it applies to such commodities even when sold before transportation.

§ 896. United States v. Camden Iron Works, 150 Fed. 215. Sufficient facts were held to be set forth to constitute interstate shipments; and departure from the filed schedules was held to be clear evidence of discrimination.

§ 898. McNeill v. Southern Ry., 202 U. S. 543, 50 L. Ed. 00, 00 Sup. Ct. 000. State cannot regulate the delivery of interstate freight; *quaere* whether a railroad can be required to deliver freight upon private tracks, even when interstate commerce.

§ 899. Gulf & C. & S. F. Ry. v. Texas, 204 U. S. 000, 50 L. Ed. 00, 00 Sup. Ct. 000. After a shipment has reached its set destination its further transportation within a State is not interstate commerce, regardless of the fact that further consignment was intended.

§ 902. Larrabee Four Mills v. Missouri Pac., 00 Kans. 000, 88 Pac. 72. Switching cars, separately paid for, is preliminary to carriage, and not interstate commerce therefore.

§ 918. Harkellel v. Missouri K. & T. R. R., 12 I. C. C. Rep. 31. As the rate complained of was for an impracticable transit for coal, there being many nearer sources of supply, it was held that the matter was not in shape for consideration.

§ 943. Evans v. L. & N. C. Ry., 00 Ky. 000, 78 S. W. 588. Carriers cannot discriminate between applicants asking the same service under the same conditions.

§ 944. United States v. Chicago & Alton Ry., 148 Fed. 646. Repayment of $1 to certain shippers designated as compensation for use of their trackage held to constitute a rebate punishable under the Interstate Commerce Acts.

§ 945. United States v. Standard Oil Co., 148 Fed. 719. Both consignee and consignor may be punished under the Interstate Commerce Acts for receiving rebates by cancellation of published terminal charges in their favor.

§ 949. State v. Atlantic Coast Line Ry., 00 Fla. 000, 41 So. 705. Railroads must not discriminate by performing services in different ways for different patrons, for all have right to demand what is done for any.

§ 956. United States v. Milwaukee Refrigerator Tr. Co., 145 Fed. 1006. A private car line allied by community of interest with a brewing company held to be guilty of receiving rebates under the Interstate Commerce Acts by taking a commission from carriers for furnishing them with business.

§ 959. Transportation of Newspaper Employees, 12 I. C. C. Rep. 16. Passenger and freight rates must be kept distinct henceforth, therefore transportation of newspaper employees cannot be included in rate for packages of newspapers; only enumerated persons can be given free or reduced transportation, caretakers of newspapers are not included.

§ 992. Cattle Raisers Association v. Galveston, H. & S. A. R. R., 12 I. C. C. Rep. 21. Joint through rates held to be required by public convenience, and established under enlarged powers of the commission.

§ 996. J. W. Moran & Son v. Missouri P. Ry. et al., 11 I. C. C. Rep. 598. A rate of 42 cents per 100 pounds, Little Rock, Ark., to Hope, applied against shipments originating on other lines than those affiliated with the defendant held unreasonable; and a rate of 11 cents held to be the reasonable rate in view of other local rates.

§ 1016. Wabash Ry. Co. v. Sloop, 00 Mo. App. 000, 98 S. W. 607. Posting of schedules must be public before Interstate Commerce Act applies to the situation, and prevents the bringing of common law actions.

§ 1017. Texas & P. Ry. v. Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 000, 00 Sup. Ct. 000. A tariff of rates, of which schedules have been filed by a carrier with the Interstate Commerce Commission, goes into effect then, and thereby any common law action to recover for overcharge is abrogated, provided the schedule rates are observed.

§ 1312. Chicago, I. & L. Ry. v. Railroad Com'n., 00 Ind. App. 000, 78 N. E. 338. Power to revise rates is reserved always to the Legislature, acting through commissions, duly empowered, if so arranged.

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